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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA on the RELATION of SAN JOSE POLICE OFFICERS' ASSOCIATION,

Plaintiff,

vs.

CITY OF SAN JOSE, and CITY COUNCIL OF SAN JOSE,

Defendants.

/

Case No. 113-CV-245503

DECLARATION OF CHRISTOPHER E. PLATTEN IN OPPOSITION TO APPLICATION FOR LEAVE TO INTERVENE

DATE: APRIL 5, 2016
TIME: 9:00 A.M.
DEPT.: 7
JUDGE: HON. BETH McGOWEN

I, CHRISTOPHER E. PLATTEN, declare:

1. I am an attorney licensed to practice law in the State of California and shareholder in the firm of Wylie, McBride, Platten & Renner.

2. The firm is counsel to International Association of Firefighters, Local 230 ("Local 230"), the exclusive bargaining representative for firefighters employed by the City of San Jose ("City") and to International Federation of Professional and Technical Engineers, Local 21 ("Local 21"), the exclusive bargaining representative for architects and engineers, confidential and management employees and maintenance supervisors employed by the City.

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3. As counsel to Local 230, I was a member of Local 230's negotiating team that bargained with the City over a ballot measure to amend the City Charter as pertains to retirement benefits. Local 230 met and conferred in coalition bargaining with the San Jose Police Officers Association and with the City from June, 2011 through February, 2012. I attended most, if not all of the bargaining sessions among the three parties. The bargaining terminated when the City Council adopted Resolution No. 76158 on March 6, 2012 placing Measure B on the June, 2012 election ballot.

4. In response to the enactment of Measure B by the voters of the City in June 2012, both Local 230 and Local 21 filed unfair practice charges with the Public Employment Relations Board ("PERB") asserting that the City Council of the City had failed to exhaust its bargaining obligation with Local 230 and Local 21 prior to placing Measure B on the ballot. Local 230's unfair practice charge was filed with the PERB on June 6, 2012. Local 21's unfair practice charge was filed with the PERB on August 31, 2012. The obligation of the City Council to bargain prior to placing Measure B on the ballot rests upon the provisions of the Meyers-Milias-Brown Act ("MMBA"), California Government Code Sections 3500 et seq. and the decision of the state Supreme Court in *People of the State of California el rel Seal Beach Police Officers Association v. City of Seal Beach* (1984) 36 Cal.3d 591.

5. The PERB issued complaints on Local 230's and Local 21's unfair practice charges. The complaints are denominated as International Association of Firefighters, Local 230 v. City of San Jose, Case No. SF-CE-969-M and International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. City of San Jose, Case No. SF-CE-996-M.

6. The two complaints were consolidated for trial. On or about February 10-12, 2014, a trial was held in front of PERB Administrative Law Judge ("ALJ") Eric J. Cu.

7. On or about November 5, 2014, ALJ Cu issued a proposed decision in Case No. SF-CE-969-M sustaining Local 230's claim that Measure B had been placed on the ballot by the City Council in violation of the City's obligation to meet and confer in good faith. A true and correct copy of Judge Cu's decision is attached hereto as Exhibit 1. ALJ Cu's decision orders, *inter alia*, the City to "[r]escind the City's March 6, 2012 approval of Resolution No. 76158."

8. On or about November 5, 2014, ALJ Cu issued a proposed decision in Case No. SF-CE-996-M sustaining Local 21's claim that Measure B had been placed on the ballot by the City Council in violation of the City's obligation to meet and confer in good faith. A true and correct copy of Judge Cu's decision is attached hereto as Exhibit 2. ALJ Cu's decision orders, *inter alia*, the City to "[r]escind the City's March 6, 2012 approval of Resolution No. 76158."

9. The City has filed exceptions appealing ALJ Cu's proposed decisions in both cases to the PERB. The full briefing has been completed on the City's exceptions filed in both cases and the matters rest before the PERB.

10. Under the provisions of the MMBA, specifically Government Code Section 3511, the San Jose Police Officers Association ("SJPOA"), the exclusive bargaining representative for peace officers as defined in Section 830.1 of the Penal Code employed by the City, is not subject to PERB's jurisdiction. Accordingly, the SJPOA filed the instant Petition for Writ Quo Warranto directly in this Court, having been granted leave to do so by the Attorney General of the State of California.

11. The unfair practice claims filed by IAFF Local 230 and IFPTE Local 21 before PERB and the SJPOA Writ filed in the instant matter concern the exact same issue: Whether the City violated its obligation under the MMBA to meet and confer in good faith over the content of Measure B prior to its placement on the June 2012 ballot.

12. As stated in the declaration of Gregg McLean Adam, counsel to Realtor and Plaintiff SJPOA, because the cases brought by Local 230 and Local 21 before the PERB are not yet final, neither union has yet established the predicate grounds permitting the filing of an application with the Attorney General for permission to file a writ quo warranto as a co-realtor or joinder in this writ action.

13. Subsequent to the issuance of the proposed decisions by ALJ Cu in the unfair practice cases involving IAFF Local 230 and IFPTE Local 21, all labor associations in the City, including but not limited to IAFF Local 230, IFPTE Local 21 and the SJPOA reached a settlement agreement with the City which serves as the basis for the stipulation for entry of judgment and the issuance of the writ quo warranto in this case.

I declare under penalty of perjury under the laws of the State of California that the foregoing statement is true and correct. Executed this 22nd day of March, 2016 at San Jose, California.

CHRISTOPHER E. PLATTEN

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EXHIBIT 1

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 230, Charging Party, v. CITY OF SAN JOSÉ, Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-969-M PROPOSED DECISION (11/5/2014)

Appearances: Wylie, McBride, Platten & Renner, by Christopher E. Platten, Diane Sidd-Champion, Attorneys, for International Association Of Firefighters, Local 230; Renne Sloan Hotlzman Sakai LLP, by Charles D. Sakai and Steven P. Shaw, Attorneys, for City of San José.

Before Eric J. Cu, Administrative Law Judge.

In this case, an exclusive representative accuses a public agency of negotiating in bad faith over a proposed ballot measure to change employee retirement benefits. The agency denies any violation and maintains that it satisfied any existing bargaining obligations.

PROCEDURAL HISTORY

On June 6, 2012, International Association of Firefighters, Local 230 (Local 230) filed an unfair practice charge with Public Employment Relations Board (PERB or Board), against the City of San José (City) alleging a violation of the Meyers-Milias-Brown Act (MMBA) and PERB Regulations.[1] On March 8, 2013, the PERB Office of the General Counsel issued a complaint alleging that the City negotiated in bad faith by knowingly providing Local 230 with inaccurate financial information and by approving a ballot measure that would change

[1] The MMBA is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

employees' retirement benefits without completing good faith negotiations. On April 2, 2013, the City filed an answer to the complaint denying the substantive allegations and asserting that the ballot measure was approved after completing any required bargaining. It also asserted multiple affirmative defenses, including the defense that its actions were justified by operational need and business necessity.

An informal settlement conference was scheduled for July 9, 2013. That meeting was cancelled at the request of Local 230 and over the City's objection. The matter proceeded to formal hearing on February 10-12, 2014. This case was consolidated for the formal hearing only with another case, SF-CE-996-M, involving similar claims against the City by International Federation of Professional and Technical Engineers, Local 21 (Local 21). During the first day of hearing, the City, Local 230, and Local 21 agreed that the evidence submitted during the hearing would apply to both PERB case numbers SF-CE-969-M and SF-CE-996-M. The parties requested that PERB issue a separate decision for each case.

During the hearing, the City requested that PERB take official notice of a June 17, 2013 Order in Santa Clara Superior Court case number 1-12-CV-237635, involving the parties.[2] The assigned Administrative Law Judge (ALJ) admitted the Order as part of the record with the following caveat: "I don't think that the opinion reached by the Superior Court has any preclusive effect about the bargaining charges at issue here. However, if the parties want to argue otherwise, you're free to do so by referencing the [Order]."

The parties filed simultaneous closing briefs on May 12, 2014. In conjunction with its brief, the City also filed a second request for notice. In the second request, the City again

[2] The Order concerned the City's petition for writ of mandate and petition to compel interest arbitration in negotiations relating to the ballot measure. The court in that matter ordered the City and Local 230 to proceed to impasse arbitration.

asked PERB to take notice of the June 17, 2013 Santa Clara Superior Court Order. It also requested notice of a decision from the Sixth Appellate District Court, case number H039911, denying Local 230 writ relief or a request for stay of the Superior Court Order. On June 1, 2014, Local 230 filed its opposition to the City's request. It concurrently filed its own request for notice of the full record in those two court proceedings. The City filed a reply brief on June 11, 2014. The City stated that it did not oppose Local 230's request for notice. Local 230 filed a letter in response to the City's reply on June 16, 2014.

On July 25, 2014, the ALJ requested that the parties submit additional briefing over a claim raised in Local 230's brief that was not pled in the PERB complaint. The parties obliged and submitted those briefs on September 3, 2014. At that point, the record was closed and the case was considered submitted for decision.

THE PARTIES' REQUESTS FOR NOTICE

The City reasserts the request for notice of the June 17, 2013 Order in Santa Clara Superior Court case number 1-12-CV-237635. That request was already granted on February 10, 2014, and the parties offered no persuasive reason for revisiting that decision. I accordingly decline to change my earlier ruling. The City now requests notice of a related decision from the Sixth Appellate District Court. That request is also granted, as is Local 230's request for notice of the record from those cases. The persuasive weight of these documents will be discussed, as necessary, below.

FINDINGS OF FACT

The Parties

The City is a "public agency" within the meaning of MMBA section 3501(c) and PERB Regulation 32016(a). Local 230 is an "exclusive representative" within the meaning of PERB Regulation 32016(b). Local 230 represents the City's firefighters bargaining unit.

The City's Basic Governance Structure

The City's governing body is a Council of 11 publicly elected officials, including the Mayor and 10 Councilmembers. Chuck Reed was the Mayor during the incidents in this case The Council makes decisions on behalf of the City by majority vote during its weekly meetings, typically held on Tuesday evenings. The Mayor, individual Councilmembers, or other City officials may draft memos to the Council, who may adopt, modify, or reject the recommendations in those memos. The City's fiscal year runs from July 1 until June 30.

The City's Pension System

The City has a defined benefit retirement plan, or pension system, for all its employees. The City's pension system is independent from other pension management agencies, such as California Public Employees Retirement System (CalPERS). The pension system has two basic plans: (1) a plan for police officers and firefighters (Police and Fire Plan); and (2) a plan for all other City employees (Federated Plan). Each plan is managed by a separate board of decision-makers (the Pension Boards) who are not directly affiliated with the City, the City Council, or any City unions. The Pension Boards are responsible for determining the City's annual contributions for each plan, based on projections from its independent actuary. The Pension Boards' actuary conducts annual valuations, typically around the end of the calendar year. Those valuations include five-year projections about the total cost of the pension plans

based on assumptions such as retirement age, the duration that retirees will continue receiving benefits, and investment returns. At all times relevant to this case, the Pension Boards used a company named Cheiron as its actuary. The bulk of the City's contributions are paid with money from its general fund.

The Police and Fire Plan

The key elements of the Police and Fire Plan include a benefit calculation of 3% of final compensation per year of service for every year over 20 years and with retirement eligibility at 55 years old with 20 years of service. The maximum pension benefit is 90 percent of final compensation. Final compensation is determined by the average base pay of the employee's highest 12 months of service. Benefits are also augmented by a guaranteed annual 3 percent Cost of Living Adjustment (COLA). Retirees may also receive Supplemental Retiree Benefit Reserve (SRBR) payments, which are payments calculated from investment returns in excess of expected amounts. Retirees also receive healthcare benefits.

The Federated Plan

The key elements of the Federated Plan include a benefit calculation of 2.5 percent of final compensation per year of service, retirement eligibility at 55 years or 30 years of service, and a maximum benefit of 75 percent of final compensation. As with the Police and Fire Plan, final compensation is determined by the average base pay of the employee's highest 12 months of service. The Federated Plan also includes a guarantees 3 percent COLA, SRBR, and retiree healthcare benefits.

The City's Employer-Employee Relations Resolution

City Resolution No. 39367 is its Employer-Employee Relations Resolution (EERR). It provides certain procedures for administering various aspects of personnel management.

EERR section 2, includes definitions of various terms. Relevant to this case, EERR section 2(l) defines "Impasse" as "a deadlock in discussions between a majority representative and the City over any matters concerning which they are required to meet and confer in good faith[.]" EERR section 23 provides for impasse procedures, which "may be invoked by either party after a bona fide effort has been made to meet and confer in good faith and such efforts fail to result in agreement." That main procedure in section 23 is mediation. If mediation is unsuccessful, the parties may agree to other dispute resolution mechanisms. Nothing in the EERR requires the parties to meet the section 2(l) definition of "impasse" before invoking the section 23 procedures.

The City's Economic Downturn

The City was one of a number of public agencies in California experiencing economic stress over the past decade. The City asserts that it operated at a deficit from fiscal year 2003-2004 through 2011-2012, meaning its expenses outpaced revenue. During that same timeframe, the City records indicate that it reduced the number of budgeted employee positions from over 7,000 to under 6,000. In 2010, the City conducted an audit to analyze the sustainability of its two pension plans. The audit concluded that pension benefits have increased every year and were expected to continue increasing. Contributions to the pension system also grew during that timeframe but, according to the study, benefit payments consistently exceeded pension contributions since 2001. That trend continued even during years when the City cut staff or when the pension plans experienced investment losses.

The City auditor expressed concerns about the City's pension liability, including the fear that the City's pension contributions would constitute an increasing proportion of the City's budget. The City auditor suggested that this may force the City to reduce the level or

quality of its services to pay its benefits costs. Another concern was the auditor's finding that pension benefit payments have outpaced both contributions and existing assets in the pension system, thereby creating a growing unfunded liability within the system.

These circumstances factored into the City's 2011 negotiations with its 11 bargaining units. Many units, including Local 230, agreed to a 10 percent reduction in base salary. Around the same time, in March 2011, the parties reached a side letter agreement to bargain further over "pension and retiree healthcare benefits for current and future employees" upon request from either side. They further agreed that bargaining would commence within 10 days from the date of the request.

In April 2011, City Mayor Chuck Reed issued a press release about the effects of pension costs on the City's budget. Although not made specifically clear for the record, the press release apparently had a wide distribution, including a posting on the City's website. The press release mentioned the 10 percent negotiated concessions, but expressed the City's intent to seek additional savings via retirement reform and benefits changes. The press release also estimated that under an "optimistic scenario," the City's retirement costs would equal $400 million per year by 2015. The press release further stated that the director of the City's Retirement Services Department[3] said that costs could rise to $650 million per year during that same time period if certain assumptions, such as investment returns, are less favorable.

On or around April 14, 2011, Local 230 sent the City a letter informing the City that "Local 230 is prepared to begin discussions as per our [March 3, 2011 Side-Letter Agreement] at any time that is convenient for you and your team." On May 15, 2011, City Director of

[3] Unlike the Pension Boards, which operate independently from the City, the City's Retirement Services Department is a City department that oversees matters relating to the City's pension obligations.

Employee Relations, Alex Gurza, replied to Local 230's letter stating that he would contact the union after City Manager Gina Figone completed a plan recommending City cost reductions.

The Fiscal Reform Plan

On May 2, 2011, Figone released a document entitled the Fiscal Reform Plan. The Fiscal Reform Plan recommended changes to achieve City savings and, ultimately, to restore City services to the levels that existed in January 2011. Among the recommendations made in the report were using SRBR funds to pay for retirement benefits, creating a second tier of retirement benefits for new employees, changing the benefits for both current employees and retirees, and increasing employees' obligation to share in pension costs. The Fiscal Reform Plan estimated that the savings from its various retirement plan recommendations equaled around $216 million over five years. The Fiscal Reform Plan also estimated that pension costs could increase to $400.7 million by the 2015-2016 fiscal year if no changes were made.

The Mayor's May 13, 2011 Memo

On May 13, 2011, Mayor Reed, along with three other Councilmembers issued a memo to the City Council. The memo included a "RECOMMENDATION" section where the authors recommended declaring a fiscal emergency due to what they perceived as urgency for fiscal reforms "to avert a fiscal disaster, prevent substantial degradation of public safety and other vital city services, and maintain the integrity of our retirement system[.]" The authors also recommended approving the Fiscal Reform Plan, including all proposed retirement reforms. The core recommendations included sharing unfunded pension costs with employees equally and limiting employees' retirement benefits. The authors also proposed what would later be referred to as "Safety Net" provisions, which limited the City's expenses if City services ever fell below what existed on January 1, 2011.

The May 13, 2011 memo also included a "BACKGROUND" section, which described the City's financial condition from the authors' perspective. In that section, the authors repeated the assertion from the Fiscal Reform Plan that retirement costs could increase to $400 million by 2016. The memo also repeated the assertion from Mayor Reed's April 2011 press release that costs could rise to $650 million by 2016 under different, less-favorable assumptions. It is undisputed that no actuary ever supported the $650 million figure.

On May 24, 2011, the City Council adopted both the Fiscal Reform Plan and the May 13, 2011 memo. The Council deferred action on the recommendation to declare a fiscal emergency. The City Council further "direct[ed] staff to proceed with steps necessary to implement the [Fiscal Reform Plan], including meeting and conferring with the bargaining units, as applicable."

On May 25, 2011, Local 230 sent Gurza another letter, "to reaffirm Local 230's availability to begin meaningful discussions on retirement reform." In the letter, Local 230 President Robert Sapien, expressed his opinion that "we should begin as soon as possible."

Local 230's Demand to Bargain

On June 3, 2011, the City sent Local 230 a letter explaining its plan to propose a ballot measure concerning retirement reform issues. The letter further stated that the "terms of the proposed ballot measure are delineated in the enclosed [May 13, 2011] memorandum" that the City Council adopted. The City invited Local 230 to discuss the matter. Local 230 responded the same day stating that it had already requested to commence retirement reform negotiations earlier on April 14 and May 25, 2011. It further stated that "Local 230 is now demanding, in the politest sense of the word, that the City honor the provisions of the side letter agreement,

and commence negotiations immediately." Mayor Reed also released another memo that day to the City Council, reiterating both the $400 million and the $650 million figures.

On June 7, 2011, the City Council delayed initial plans for a retirement reform ballot measure on its November 2011 ballot due to concerns from City unions. The City Council also stated that it was under a "tight timeframe" and expressed interest in resolving any issues with the proposed reform prior to the start of the 2012-2013 fiscal year.

Local 230 and the City's police officers' union decided to participate in bargaining jointly.[4] They informed the City of that decision on June 9, 2011.

The Pledge of Cooperation

The parties discussed establishing a framework for their forthcoming retirement negotiations. It was understood that the City preferred to effectuate at least some parts of its retirement reform plans through a local ballot measure presented to City voters. It was further understood that under state election law, the City Council must approve any ballot measure at least 88 days before the election. (See Elec. Code, § 9255(b).) At the time, the City targeted March 6, 2012, for the election.

On June 20, 2011, the parties entered into and signed a "Pledge of Cooperation," which outlined some basic concepts about the negotiations. Included in that document was that each party would use their own actuary to develop cost estimates. The parties also acknowledged that the Pension Boards' own actuary provided the official numbers used by the pension plans.

The parties also agreed as follows:

[4] The POA is not a party to either the present case, or its companion case involving Local 21, case number SF-CE-996-M. No POA witness testified during the hearing. For that reason, POA's involvement in the parties' negotiations will only be discussed as needed to address the issues raised by Local 230's charge.

> The parties agree to meet and confer in good faith and agree to complete the negotiation process by October 31, 2011. If the parties are unable to reach an agreement on retirement reform and/or related ballot measure(s) by October 31, 2011, the parties shall proceed to impasse, pursuant to procedures outlined in the [EERR section 23].

The Pledge of Cooperation also included the agreement that the City could exercise its constitutional authority to amend its charter through the ballot process at the conclusion of negotiations and impasse procedures and that neither side was waiving any legal rights.

The City's Initial Proposal

On June 21, 2011, the City informed Local 230 that the May 13, 2011 memo was the City's "only actual proposal for a ballot measure." By July 6, 2011, the City sent Local 230 draft ballot measure language including most of the recommendations from the May 13, 2011 memo. Unlike the memo, however, the City's ballot language proposal did not reference the $650 million figure, or any other cost estimate for that matter.

The City proposed creating a less costly retirement program, called the Voluntary Election Program (VEP). As its name implies, employees' participation in the VEP would be voluntary. The key features of the VEP included a slower benefits accrual rate, a higher retirement eligibility age, and longer years of service eligibility requirement for medical benefits. Employees that did not opt into the VEP would be responsible for 50 percent of the City's unfunded pension liability costs.

The City also proposed creating a new Tier 2 retirement plan for all new employees. Under Tier 2, the City's contributions to employee benefits would be between 6.2 and 9 percent and could not exceed 50 percent of the total cost of the new plan. The minimum retirement age would rise from 55 to 60 for employees previously eligible for the Police and Fire Plan, and from 60 to 65 for all other employees. The City also reserved the right to not

use a defined benefit plan for the newly created Tier 2 retirement plan. If the City elected to use a defined benefit plan, benefits would accrue at a rate of 1.5 percent of final salary per year of service with a maximum COLA benefit of 1 percent per year, to be determined by the Consumer Price Index (CPI). An employee's final salary, for purposes of determining the benefit amount, would be calculated based on the average of that employee's final three years of employment. Employees in the Tier 2 plan were eligible for retiree medical benefits after 20 years of service.

The City also proposed modifying both the existing Police and Fire Plan and the Federated Plan by reducing the future accrual rate for each plan to 1.5 percent of final salary per year of service, reducing COLA to a maximum of 1 percent, dictated by the CPI, and eliminating SRBR payments. It specified that any benefits earned and accrued in prior service would not be affected by the changes proposed. The City also proposed increasing employees' minimum retirement age by six months every year until the retirement age reached 60 for Police and Fire Plan employees and 65 for Federated Plan employees. It proposed a similar incremental increase for retiree medical benefits eligibility to a maximum eligibility of 20 years of service. Final salary, for determining benefit amounts, would be calculated based on the employee's final three years of employment. The City also proposed reducing existing retirees' COLA payments to a maximum of 1 percent per year, dictated by the CPI.

The City's proposal also included the "Safety Net" provisions described in the May 13, 2011 memo. Those provisions limited the City's ability to grant various types of compensation increases or other employee benefits and rights if the City had to reduce service levels below what existed on January 1, 2011.

Cheiron's Mid-Cycle Valuation

On July 20, 2011, the Pension Plans' actuary, Cheiron, conducted a study of its plans, including a five-year cost projection. Cheiron predicted that pension costs for both plans combined would reach $431 million by 2016. The City Council received Cheiron's report in August 2011. Local 230 received the report on or around the same time.

The Parties' Pre-Mediation Negotiations

The parties' met 13 times between July 20 and October 31, 2011, but did not reach agreement. The following is a brief discussion of some of the more relevant events during those meetings.

The City's September 9, 2011 Proposal

On September 9, 2011, the City made a new proposal in the form of draft ballot measure language. Under the new proposal, employees that opted into the VEP would accrue benefits at a rate of 1.5 percent of final pay per year. COLA payments would cap at 1 percent, tied to the CPI. Final pay would be calculated using the average salary of an employee's three highest consecutive years.

The City also modified its proposal regarding employees who did not opt into the VEP. It dropped its proposal to modify the benefits accrual rate for those employees. It also proposed that employees share the City's unfunded pension liability costs by decreasing salaries by 5 percent each year until the reductions equaled 50 percent of the City's unfunded liability costs. The reductions could not exceed 25 percent of employees' pensionable income.

The City also proposed suspending COLA and SRBR payments to retirees if the City's unfunded liability costs rose above what existed on June 30, 2010. COLA payments could

only be restored by either voter approval or a return to 2010 funding levels for three consecutive years.

Local 230's September 2011 Actuarial Analysis and Proposal

On September 26, 2011, Local 230's actuary, Tom Lowman, created projections about the City's retirement costs. Lowman estimated that costs would rise to about $320 million by the 2015-2016 fiscal year. Lowman also attempted to calculate how the City reached its own estimate of $400 million in costs for the same time period. Lowman concluded that the City failed to account for decreases stemming from recent personnel reductions and the 2011 negotiated 10 percent salary concessions. Local 230 did not task Lowman with deriving the source of the $650 million figure used by the City. According to Sapien, Local 230 had limited resources to spend on its actuary and that he "didn't want him to calculate $650 million until he figured out $400 million."

On September 27, 2011, Local 230 made a proposal including a three-tier retirement plan. All tiers were defined benefit plans. Tier I would be the existing plan, which Local 230 proposed to maintain at status quo on the essential elements of the benefits accrual rate, maximum benefit amount, retirement age, post-retirement COLA, and calculation of final compensation. Tier I would be closed off to new members.

Current employees could also opt into a Tier II benefit plan administered by CalPERS. Employees under Tier II would have a benefits accrual rate of 3 percent of final salary at age 55 with a maximum benefit of 90 percent of final salary. Tier II employees would also receive a maximum of a 3 percent COLA, tied to the CPI. Final salary would be calculated based on the average of an employee's highest paid 36 months. Tier II employees would not receive SRBR payments.

Local 230's proposal also included a Tier III plan for new employees, also administered by CalPERS. Tier III would have a 2 percent at age 50 benefit calculation with a maximum benefit of 90 percent of final salary. Local 230 also proposed a 2 percent maximum COLA, tied to CPI. Tier III employees would not be entitled to SRBR payments. Employees' final salary would be calculated based on the average of the employees highest paid 36 months. Local 230's actuary, Lowman, estimated that this proposal would save around $277 million over five years based on the City's projected retirement costs.

October 14, 2011 Meeting

The CalPERS chief actuary, Alan Milligan, attended the parties' October 14, 2011 negotiation session at Local 230's invitation. The parties and Milligan discussed the impacts of moving some unit members to CalPERS plans with some remaining in the existing Police and Fire Plan. The City was concerned that Local 230's proposal closed off the existing Police and Fire Plan (Tier I under Local 230's proposal) to new members, and that it could not foresee the impacts of having a plan with a large number of beneficiaries and no new members. It also argued that much of the savings Local 230 expected from the move to CalPERS would merely push the City's same pension costs further into the future and would not actually reduce total costs. The City also had concerns about how to transfer assets between the Police and Fire Plan and CalPERS, should unit members opt into Local 230's proposed Tier II.[5]

[5] Sapien testified that he never understood why the City was opposed to Local 230's CalPERS proposal, stating "I don't know that the City ever told me why they were opposed to the proposal." This assertion was inconsistent with the record as a whole. In bargaining notes submitted by the City, members of the City's negotiating team clearly expressed concerns similar to those described above. The City's note-taker, Arecely Rodriguez, testified that she attempted to have her notes reflect the actual conversations held during bargaining as accurately as possible. In a letter dated March 5, 2012 (discussed in more detail herein), the City expressed the same and other concerns about Local 230's proposal to have CalPERS administer aspects of the Police and Fire Plan.

The City's Request for Impasse Mediation

Additional meetings and proposals by the City did not yield an agreement before the October 31, 2011 deadline referenced in the Pledge of Cooperation. On October 28, 2011, the City sent Local 230 a letter about participating in mediation pursuant to the Pledge of Cooperation. The City did not use the term "impasse" in the letter and did not expressly indicate that the parties were deadlocked or that it believed that there could be no further progress made in negotiations.

The November 2011 Mediation Sessions and Post-Mediation Developments

The parties participated in two mediation sessions on November 15 and 16, 2011 facilitated by State Mediation and Conciliation Services (SMCS). At hearing, the parties agreed that the discussions in mediation, aside from proposals made, would not be admitted into the record. Neither party made a proposal during the 2011 mediation sessions.

Local 230's November 18, 2011 Proposal

On November 18, 2011, Local 230 sent the City a letter stating "[w]e are dropping our proposal to move to CalPERS in order to satisfy what we understand is a philosophical demand of the City." Local 230 also acquiesced to the City's demand that any modifications to retirement benefits be included in a proposed charter amendment. Local 230 also proposed continuing the earlier negotiated 10 percent salary reductions, transferring healthcare costs for an additional 5 percent savings, and limiting the maximum retirement benefit for its newer retirement tiers to 75 percent of final compensation. When asked about this proposal during the hearing, Gurza said "[e]ven though the proposal itself wasn't acceptable, at least we -- By them dropping their CalPERS proposal, we saw that as a positive sign."

The City's November 22, 2011 Draft Charter Amendment

On November 22, 2011, the City sent Local 230 a letter stating that because there was no agreement in mediation, the City would be transmitting its proposed ballot measure on retirement reform to the City Council for adoption and placement on the City's March 6, 2012 ballot. It attached a version of the ballot measure not previously submitted to Local 230 and not discussed either in negotiations or in mediation. Although not clear from the face of either the letter or the draft language itself, witnesses from both parties during the hearing described the November 22, 2011 draft as a new post-mediation proposal from the City.

The new draft contained some key changes from earlier versions. Those changes included increasing the benefits accrual rate for those who opted into the VEP from 1.5 percent to 2 percent of final compensation per year of service, increasing the COLA payment from a maximum of 1 percent to 1.5 percent per year, based on CPI. It also reduced the retirement age to 57 for Police and Fire employees and 62 for all others. The new version continued to include a suspension of COLA payments to retirees, but included less stringent criteria for restoring payments. The City also eliminated its previously proposed Safety Net provisions entirely. The City's negotiators described this new version as having "very significant changes" from earlier versions. City Manager Figone similarly described the new version as "far different from earlier versions" in an e-mail to City employees about the City's retirement negotiations.

On November 29, 2011, Local 230 sent the City a letter asserting that the City's November 22, 2011 proposal had not been discussed in negotiations or mediation and demanded bargaining. Local 230 also stated in the letter "[w]e assume by your letter, that irrespective of the ballot measure, the City is declaring impasse on pension reform." During

the hearing, Sapien said that Local 230 sent the letter because "we have now a new proposal in front of us that we had not discussed, and so we were asking for that opportunity."

Local 230's December 1, 2011 Proposal

On December 1, 2011, Local 230 submitted another new proposal. Whereas Local 230 had previously proposed a three-tiered plan, the new proposal included only two tiers. Tier I was still the existing plan and remained basically at status quo. New employees and current employees who opted in would be part of Tier II, and would have a benefit accrual rate of 2.5 percent of final salary per year of service with a maximum benefit of 75 percent of final salary.

The Recommendation to Delay the Election

On December 1, 2011, Figone issued a memo recommending that the City Council delay consideration of declaring a fiscal and service level emergency. In the memo, Figone reported that the Pension Boards' actuary, Cheiron, produced a preliminary valuation with new and more favorable projections from its earlier July 2011 valuation. Cheiron's new valuation projected that the City's 2012-2013 pension contribution costs would be around $55 million less than previously predicted. Mayor Reed and four Council Members made a similar recommendation in a separate memo. Mayor Reed also recommended moving the proposed election date for the ballot measure from March 6, 2012, to June 5, 2012.

The December 5, 2011 Draft Charter Amendment

On December 5, 2011, the City produced another version of its draft ballot measure. In that version, the City abandoned its plan to suspend retiree COLA payments until 2018. Instead, the City would have discretionary authority to suspend COLA payments for up to five years if the City declared a fiscal and service level emergency.

The City Council's Approval of Resolution No. 76087

On December 6, 2011, the City Council approved Resolution No. 76087, which ordered a June 5, 2012 City-wide election over the charter amendments proposed in the City's December 5, 2011 draft. At the same meeting, the City Council also deferred consideration of the earlier recommendation to declare a fiscal and service level emergency. The City never declared a fiscal and/or service level emergency at any time relevant to this case. At that point, the parties' negotiating teams had not discussed either Local 230's November 18 and December 1 proposals or the City's November 22 proposal or its December 5 draft charter amendments.

The City Council directed City staff to delay transmitting the draft charter amendments to the City registrar "to allow time for continued mediation, if requested by the bargaining units." The effect of this directive was that registrar would not immediately finalize the election materials for the June 5, 2012 election. However, it was understood that the election would proceed over the City's proposed charter amendments unless the City Council rescinded Resolution No. 76087. In order to satisfy state election law requirements, the City had to finalize charter amendments by March 9, 2012, to qualify for the June 5, 2012 ballot.

The City's Invitation for Further Mediation

On December 9, 2011, the City sent Local 230 a letter inviting it to re-engage in mediation "using the same framework" as the June 20, 2011 Pledge of Cooperation. The City also mentioned the need to submit the proposed charter amendments in Resolution No. 76087 to the registrar no later than March 9, 2012.

Local 230 responded on December 13, 2012. It stated that the City Council's approval of Resolution No. 76087 was illegal because the City did not satisfy its bargaining obligations

and did not declare impasse. Local 230 also stated that the parties had not discussed either parties' post-mediation proposals. Local 230 also took the position that any impasse in negotiations was broken due to Cheiron's newer, more favorable, cost valuations, as well as Local 230's willingness to move away from proposals involving CalPERS. Local 230 then stated that it would agree to resume mediation using a private mediator, as opposed to SMCS. Local 230 also stated that agreeing to further mediation did not waive its right to challenge the legality of the City's bargaining conduct.

On December 15, 2011, the City responded to Local 230's letter, indicating that impasse was "automatic" under the Pledge of Cooperation. Despite this disagreement, the parties agreed to continue mediation with a private mediator. Those sessions were held on January 17 and 18 and February 6 and 10, 2012.

The City's February 10, 2012 Proposal

On February 10, 2012, the City presented Local 230 with a new proposal. The City proposed increasing the accrual rate for any defined benefit plan for new employees from 1.5 percent to 2 percent of salary per service year. It also increased COLA benefits for new employees from a maximum of 1 percent to 1.5 percent, depending on CPI.

For current employees that did not opt into the VEP, the City continued proposing reducing compensation to account for the City's unfunded pension liability. The City improved its proposal to reduce the salary of employees electing not to opt into the VEP. Instead of reducing salaries by 5 percent of pensionable income per year to a maximum of 25 percent, the City proposed a decrease of 4 percent per year to a maximum of 16 percent of income. As with prior proposals, the reductions would not exceed 50 percent of the City's unfunded pension liability.

According to Sapien, the City told Local 230 that, if it did not adopt the February 10, 2012 draft ballot measure, then the City would place the charter amendments in Resolution No. 76087 on the June 5, 2012 ballot. Sapien described this as "almost an ultimatum" to accept the City's current proposal. Local 230 did not agree and mediation ended with no deal.

On February 21, 2012, the City sent Local 230 a letter confirming that no agreement was reached in mediation. It stated that the City Council would vote on replacing Resolution No. 76087 with the City's February 10, 2012 draft charter amendments. That day, City Manager Figone issued a memo to the City Council recommending repeal of Resolution No 76087 and adoption of a new resolution consistent with the City's February 10, 2012 draft.

On February 28, 2012, Local 230 demanded bargaining over the City's new draft ballot language. According to Local 230's demand, there were "significant restrictions" placed on Local 230's acceptance of the February 10, 2012 draft language in mediation. Around this time, Mayor Reed discussed retirement reform issued on a local news program. During his discussion on the air, he mentioned the possibility that the City's pension costs could rise to $650 million based on certain assumptions.

Local 230's March 2, 2012 Proposal

On Friday, March 2, 2012, Local 230 submitted a new proposal. Local 230 again proposed a three-tiered pension plan, two of which would be administered by CalPERS. Local 230 also proposed benefit structures similar to its earlier CalPERS proposals. One significant difference was Local 230's "performance guarantee," which would require all current employees to reduce their salary between 4 and 16 percent if fewer than 60 percent of employees opted into its Tier II plan. Under Local 230's proposal, the lower the number of enrollees into the Tier II plan, the greater the salary reduction. Local 230 said it expected at

least 66 percent of its members to opt into Tier II. On Saturday, March 3, 2012, Local 230 proposed meeting to discuss the proposal.

On Monday, March 5, 2012, the City responded to Local 230 by letter. The City stated its belief that Local 230's latest proposal was a "step backwards" because it returned to CalPERS. Among the problems the City identified were that moving aspects of the Police and Fire Plan to CalPERS would delay, not reduce, the City's pension liability, that redistributing the Police and Fire Plan's assets to CalPERS was uncertain, and the existing plan (Local 230's proposed Tier I), would have increased unfunded liability if it were closed off to new members. The City also stated that it did not expect to achieve significant savings from Local 230's proposal. The City said that the "performance guarantee" was unacceptable because the City also believed that a significant number of employees would opt into Tier II, but that Tier II would not generate enough savings.

The City Council's Approval of Resolution No. 76158

On March 6, 2012, the City Council voted to approve Resolution No. 76158. That resolution repealed Resolution No. 76087, and approved a City-wide election on June 5, 2012 concerning the proposed City's February 21, 2012 charter amendments. That matter became known on the City's ballot as Measure B. Measure B passed among the local electorate by a vote of roughly 70 percent to 30 percent.

The City's Petition to Compel Interest Arbitration

On June 12, 2013, and pursuant to the City's petition, the Superior Court of Santa Clara County issued an Order compelling the parties to participate in interest arbitration concerning their negotiations over retirement benefits. The court concurrently denied Local 230's cross

petition to stay the arbitration proceedings. On April 30, 2014, the Sixth Appellate District Court summarily denied Local 230's petition for review of the lower court's actions.

ISSUES

I. Did the City knowingly provide Local 230 with inaccurate information about its financial resources in violation of MMBA section 3506.5(c)?

II. Should PERB consider Local 230's previously unalleged claim that the City violated the MMBA by approving Resolution No. 76087 prior to completing bargaining? If so, did the City violate the duty to meet and confer in good faith?

III. Did the City violate the duty to meet and confer in good faith by approving Resolution No. 76158?

CONCLUSIONS OF LAW

I. Providing Local 230 With Allegedly Inaccurate Financial Information

The PERB complaint alleges that the City violated MMBA section 3506.5(c) by falsely claiming that its pension costs could rise to $650 million by 2016 if certain unfavorable assumptions were used. MMBA section 3506.5(c) states in relevant part that:

> knowingly providing a recognized employee organization with inaccurate information regarding the financial resources of the public employer, whether or not in response to a request for information, constitutes a refusal or failure to meet and negotiate in good faith.

The most straightforward understanding of this language is that a public agency violates the duty to meet and negotiate in good faith if: (1) it provides a recognized employee organization

with information about its financial resources; (2) the information is inaccurate; and (3) the public agency knew of its inaccuracy at the time it was provided.[6]

Under the facts of this case, it is reasonable to construe the City's references to the $650 million pension cost estimate as information about the City's "financial resources" for the purposes of MMBA section 3506.5(c). The City referenced that figure in, among other documents, the May 13, 2011 memo provided to Local 230 at the outset of bargaining. The purpose of those documents was to draw a connection between the City's pension liability and its ability to provide services to the public. And the relationship between pension costs and City services featured prominently in the City's proposals. For that reason, I conclude that the documents with the $650 million estimate relate to the City's financial resources.

The record about the remaining issues is less clear. For instance it is not readily apparent that information provided was inaccurate. The City stated in the May 13, 2011 memo pension costs could rise as high as $650 million by 2016 under different, more adverse, circumstances. Subsequent references to the $650 million figure were variations on that basic assertion. It is perhaps axiomatic that the results of an equation will change when one modifies the inputs to that equation. The facts of this case exemplify this principle. Local 230, the City, and the Pension Boards each retained their own actuary to estimate the City's future pension costs. Each reached different conclusions because each calculated their estimates using

[6] Neither party cites any cases interpreting the relevant provisions of MMBA section 3506.5(c). Nor have I, in my own research, found a case interpreting either this language or similar language contained in Government Code section 3543.5(c). In addition, it is noted that MMBA section 3506.5(c) took effect on January 1, 2012, after some of the operative facts in this case occurred. However, because the Legislature indicated that MMBA section 3506.5(c) clarified existing law, there is no issue regarding retroactive application. (Assem. Bill No. 195 (2011-2012 Reg. Sess.) § 1; *City of Redlands v. Sorensen* (1985) 176 Cal.App.3d 202, p. 211, citation omitted.)

different assumptions. It is also worth noting that the City was also forthcoming, both with the public and with Local 230, that the City's actuary predicted costs rising only to $400 million and that the Pension Boards' actuary predicted costs rising to $431 million. This all gives some credence to the City's basic claim that cost projections may rise under less-favorable assumptions. In addition, the City was equivocal about the possibility that the City's costs could actually rise as high as $650 million. Nothing in the record indicates that the City's costs could not rise to $650 million under any circumstances. Based on the facts presented here, Local 230 has not sustained its burden of proving that the City provided Local 230 with false information about its financial resources.

Local 230 points out that the City never conducted any actuarial analysis to support its $650 million cost estimate. Be that as it may, this is insufficient to establish that the City knowingly gave Local 230 false information. And MMBA section 3506.5(c) does not create liability solely on the basis of careless or even negligent disclosures of information. Therefore, Local 230 has not proven its claim that the City's reference to the $650 million figure in-and-of-itself violated MMBA section 3506.5(c). That claim is therefore dismissed.

II. Local 230's Claims Relating to Resolution No. 76087

Local 230 alleges that the City violated the duty to meet and confer in good faith when, on December 6, 2011, the City Council approved Resolution No. 76087 prior to completing negotiations. This allegation was not expressly referenced in the PERB complaint.

A. PERB's Review of Unalleged Violations

PERB has limited capacity to consider claims not described in the parties' pleadings. PERB may only consider such "unalleged violations" when the following criteria are met:

> (1) adequate notice and opportunity to defend has been provided the respondent; (2) the acts are intimately related to the subject

> matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on the issue.

(*Lake Elsinore Unified School District* (2012) PERB Decision No. 2241, p. 8 (*Lake Elsinore USD*), citing *County of Riverside* (2010) PERB Decision No. 2097-M; *Fresno County Superior Court* (2008) PERB Decision No. 1942-C (*Fresno Superior Court*); *Tahoe-Truckee Unified School District* (1988) PERB Decision No. 668 (*Tahoe-Truckee USD*).) The unalleged violation must also have occurred within the applicable statute of limitations period. (*Lake Elsinore USD*, *supra*, at p. 9, citing *Fresno County Superior Court*.) PERB must articulate its rationale for considering or rejecting an unalleged violation. (*County of Riverside* (2006) PERB Decision No. 1825-M, p. 10.)[7]

In *Lake Elsinore USD*, *supra*, PERB Decision No. 2241, the Board reviewed a union's claims that an employer took adverse actions against an employee because of protected conduct not described in the PERB complaint. (*Id.* at pp. 9-10.) The Board concluded that the employer lacked notice that the union was basing its retaliation claims on the unalleged conduct. The Board reached this conclusion despite the fact that the affected employee testified about that conduct at hearing. (*Ibid.*) The union in that case raised the new retaliation theory for the first time in its closing brief. (*Id.*, citing *City of Clovis* (2009) PERB Decision No. 2074-M, *Baker Valley Unified School District* (2008) PERB Decision No. 1993; see also *Escondido Union Elementary School District* (2009) PERB Decision No. 2019, p. 31; *Tahoe-Truckee USD*, *supra*, PERB Decision No. 668, p. 8.)

[7] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, p. 616; *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, p. 13, fn. 4.)

The Board reached a different conclusion in *West Contra Costa Healthcare District* (2010) PERB Decision No. 2145-M (*West Contra Costa Healthcare*). There, the Board found that the employer had adequate notice of a unilateral change allegation not plead in the PERB complaint because facts relating to the claim were discussed in the charging party's original charge, its opening statement, and its closing brief. (*Id.* at pp. 16-17.) The Board also concluded that alleged and previously unalleged claims concerned the same course of conduct and were fully explored during the hearing. (*Id.* at p. 17.) For similar reasons, in *Fresno Superior Court*, *supra*, PERB Decision No. 1942-C, the Board permitted a union to raise an unalleged unilateral change claim based on employees' job descriptions where both parties' witnesses testified extensively about the change, the job descriptions were related to the union's existing claims, and both parties discussed the job descriptions in their closing briefs. (*Id.* at pp. 15-17.) The Board also found that the new claim was timely after concluding that the union discovered the employer's conduct within six months of the original unfair practice charge. (*Id.* at p. 17; see also *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, pp. 11-12.)

In this case, Local 230 has met all the requirements for considering its unalleged violation. As a threshold matter, Local 230's allegation in this case is timely. Claims under the MMBA have a six month statute of limitations period. (*American Federation of State, County and Municipal Employees, Council 36 (Moore)* (2011) PERB Decision No. 2165-M, dismissal letter, pp. 1-2.) Here, it is undisputed that the City approved Resolution No. 76087 on December 6, 2011, which is within six months of June 6, 2012, the date Local 230 filed its original unfair practice charge. Local 230 has accordingly established that it raised those claims before PERB prior to the expiration of the statute of limitations period. (See *SEIU-*

United Healthcare Workers West (Scholink) (2011) PERB Decision No. 2172-M, warning letter, pp. 2-3.)

Local 230 has also satisfied all of the elements of PERB's unalleged violation standard. First, the City had adequate notice that Local 230 would be challenging the legality of Resolution No. 76087. As in *West Contra Costa Healthcare, supra*, PERB Decision No. 2145-M, Local 230 referenced the City's December 6, 2011 actions in its unfair practice charge, its opening statement, and its briefs. In its opening statement, for example, counsel for Local 230 stated "the facts will show that the City Council enacted a resolution known as Resolution Number 76087 in [sic] December 6, 2011, establishing provisions for a charter amendment for the June 2012 election ballot without good faith bargaining and without reaching impasse over the provisions of the measure adopted." Counsel for the City described Resolution No. 76087 in the City's own opening remarks, asserting that the resolution was the product of progress made in negotiations. Before the charge was filed, Local 230 asserted to the City in its December 31, 2011 letter that the "City Council's vote to approve a ballot measure was illegal" because the "City did not fulfill its obligation to meet and confer in good faith- a mandatory prerequisite before it could vote to place the ballot proposal on the June 2012 ballot." That letter was admitted into evidence as a joint exhibit. This record shows that Local 230 was explicit about its view that the City's approval of Resolution No. 76087 violated to the duty to bargain under the MMBA. This was sufficient notice to the City that the legality of Resolution No. 76087 would be an issue in this case.

Second, Local 230's unalleged violation concerning Resolution No. 76087 is closely related to the claims raised in the PERB complaint. Both claims assert that the City failed to reach lawful impasse prior to approving retirement benefits changes for the local June 2012

ballot. As in in *West Contra Costa Healthcare*, *supra*, PERB Decision No. 2145-M, the City's conduct on December 6, 2011, was part of the same course of conduct as the claims explicitly referenced in the PERB complaint. It is undisputed that the City adopted Resolution No. 76087 during the same negotiations that gave rise to the unilateral change allegation described in the PERB complaint: In fact, it is undisputed that the City's approval of Resolution No. 76087 was discussed when the City made its final offer to Local 230 on February 10, 2012. Thus, the two claims sufficiently related.

The final two elements of PERB's unalleged violation analysis are also met. Local 230 premises its claim regarding Resolution No. 76087 on the theory that the parties were not at lawful impasse on December 6, 2011, when the City approved the resolution. This issue was litigated considerably throughout this case. As in *Fresno Superior Court*, *supra*, PERB Decision No. 1942-C, the City in this case had the opportunity and did question witnesses about the City's approval of Resolution No. 76087 and the parties' preceding bargaining. Both parties also submitted numerous joint and separate exhibits about that same conduct. Neither party was limited in its ability to question witnesses or introduce other evidence about the adoption of Resolution No. 76087. There was no showing that the record regarding Resolution No. 76087 is incomplete.

The City asserts that Local 230 is trying to "sandbag" the City by raising this unalleged violation in its post-hearing brief. It contends that considering this claim would violate the City's due process rights. This position is rejected. PERB's unalleged violation standards are designed to and do adequately protect the due process rights of the parties in a PERB hearing. (See *Santee Elementary School District* (2006) PERB Decision No. 1822, pp. 8-9.)

Local 230 has satisfied all the elements of PERB's unalleged violation standard. Therefore, it is appropriate to review Local 230's claim of whether the December 6, 2011 approval of Resolution No. 76087 violated the duty to bargain in good faith.

B. The Duty to Meet and Confer Over Proposed Charter Amendments

Local 230's unilateral change claims regarding Resolution No. 76087 beckons the question of what bargaining obligations a charter city has when seeking to change negotiable subjects via a charter amendment ballot measure. Both parties recognize that *People ex rel. Seal Beach Police Officers Association v. City of Seal Beach* (1984) 36 Cal.3d 591 (*City of Seal Beach*) is controlling on this issue. That case involved a city council's approval of three proposed charter amendments for its local ballot relating to the treatment of employees who participated in a labor strike. The parties in that case agreed that all three charter amendments involved "terms and conditions of employment" within the meaning of MMBA section 3504. (*Id.* at p. 595, fn. 2) The court rejected the defendant city's argument that the "meet and confer" requirements in MMBA section 3505 conflicted with a charter city's authority under California Constitution, Article XI, section 3(b), to propose charter amendments to its local electorate. It instead found that:

> No such conflict exists between the city council's power to propose charter amendments and *section* 3505. Although that section encourages binding agreements resulting from the parties' bargaining, the governing body of the agency – here the city council – retains the ultimate power to refuse an agreement and to make its own decision. [citation and footnote omitted] This power preserves the council's rights under article XI, *section* 3, *subdivision* (b) – it may still propose a charter amendment if the meet-and-confer process does not persuade it otherwise.
>
> We therefore conclude that the meet-and-confer requirement of *section* 3505 is compatible with the city council's constitutional power to propose charter amendments.

(*Id.* at p. 601 (emphasis in original).) The court based its holding on the principle that "'general law prevails over local enactments of a chartered city, even in regard to matters which would otherwise be deemed to be strictly municipal affairs, where the subject matter of the general law is of statewide concern.'" (*Id.* at p. 600, quoting *Professional Firefighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, p. 292.) The court concluded uniform fair labor practices across the state, including the process by which labor disputes were resolved, was a matter of statewide concern. (*City of Seal Beach* at p. 600.)

MMBA section 3505 defines "meet and confer in good faith" as "the mutual obligation [to] personally meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals and to endeavor to reach agreements on matters within the scope of representation[.]" Section 3505 further requires the parties to reserve "*adequate time for the resolution of impasses* where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent." (Emphasis supplied.) The California Supreme Court has previously interpreted section 3505 as precluding unilateral action from the employer until it has bargained with an exclusive or recognized bargaining representative until agreement or impasse. (*Coachella Valley Mosquito & Vector Control Dist. v. PERB* (2005) 35 Cal.4th 1072, p. 1083, citing *Santa Clara County Counsel Attorneys Assn. v. Woodside* (1994) 7 Cal.4th 525, p 537; see also *San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, p. 670.) Changes to terms and conditions of employment "prior to reaching an impasse in negotiations or completion of statutory impasse resolution procedures are a "per se" violation of the duty to bargain in good faith. (*County of Sonoma* (2010) PERB Decision No. 2100-M, p. 12, citing *Rowland Unified School District*

(1994) PERB Decision No. 1053, *Pajaro Valley Unified School District* (1978) PERB Decision No. 51.) The duty to bargain until agreement or impasse applies equally to a public agency's duty to bargain over proposed charter amendments concerning negotiable matters. (*County of Santa Clara* (2010) PERB Decision No. 2120-M, pp. 13-14.)

The City does not dispute that it has some bargaining obligation here. It argues that it is only obligated to undergo a "special bargaining process" that does not include the need to reach impasse or to exhaust any impasse procedures. This position is inconsistent with MMBA section 3505, which expressly requires the parties to reserve time during bargaining process for impasse resolution procedures. Nothing in the *City of Seal Beach*, *supra*, 36 Cal.3d 591 decision sets aside the impasse language in MMBA section 3505 when bargaining over proposed charter amendments. In fact, the court quoted section 3505 in its entirety, including the impasse provisions, as part of its rationale. (*Id.* at pp. 595-596, fn. 4.) In addition, the Board previously considered and rejected a similar argument in a case involving a proposed charter amendment for a prevailing wage measure. (*County of Santa Clara*, *supra*, PERB Decision No. 2120-M, p. 13.) There, the Board found that the requirements of MMBA section 3505 are only "satisfied if the parties either reach agreement or bargain to impasse and participate in any applicable impasse procedures." (*Ibid.*) Moreover, as the City admits in its post-hearing briefs, PERB has long found that participating in statutory impasse procedures is a "continuation of the bargaining process with the aid of neutral third parties." (*Modesto City Schools* (1983) PERB Decision No. 291, p. 36 [revd. on other grounds in *Compton Unified School District* (1987) PERB Order No. IR-50]; *County of Contra Costa* (2014) PERB Order No. Ad-410-M, p. 46; *Regents of the University of California* (1985) PERB Decision No. 520-H, p. 23.)

The City contends that the court in *City of Seal Beach*, *supra*, 36 Cal.3d 591, implied that there should be limits when bargaining over charter amendments because the court found that a city's meet and confer obligations should only create a "minimal" burden on that city's authority to amend its charter. (*Id.* at p. 599.) Placed in its proper context, the quoted language does not support the City's position. In that part of the decision, the court was addressing the defendant's argument that the MMBA's bargaining obligations violate California Constitution Article XI, section 3(b). In rejecting that argument, the court compared the matter to *District Election of Supervisors. Committee for 5% v. O'Connor* (1978) 78 Cal.App.3d 261, p. 267 (*O'Connor*), where local charter election procedures were invalidated because they conflicted with statewide election law.[8] The court in *City of Seal Beach* found the meet and confer requirements in MMBA section 3505 to be "minimal" in comparison to *O'Connor*, because a city's bargaining obligations do not directly conflict with any city rule. (*Id.* at p. 599.) At no point, did the court expressly or impliedly conclude that cities are exempt from aspects of MMBA section 3505 when bargaining over proposed ballot measures.

The City finds further support for its position in the court's statement that a city "may still propose a charter amendment if the meet-and-confer process does not persuade it otherwise." (*City of Seal Beach*, *supra*, 36 Cal.3d 591, at p. 601.) Again, nothing in the quoted portion of the decision states or implies that the court intended to excuse cities from the impasse provisions of MMBA section 3505. Furthermore, the City's argument is unsound

[8] *O'Connor*, *supra*, 78 Cal.App.3d 261, concerned a conflict between a city's local charter provision, which required signatures from 5 percent of voters to qualify a charter initiative for the ballot and a section of the Government Code, which required 10 percent. (*Id.* at pp. 264-265.) The court in that case resolved the conflict in favor of the Government Code, after concluding that uniformity in the charter amendment process was a matter of statewide concern and that the legislative enactments superseded the city's charter. (*Id.* at p. 267.)

because participating in impasse procedures does not preclude a city from proposing charter amendments. As the court in *City of Seal Beach*, said, a city may propose such amendments unless it is persuaded to change course after participating in all of the meet and confer requirements under MMBA section 3505.

The City further asserts that negotiations of a City's proposed charter amendment are unique because at the end of negotiations, the City does not impose terms on affected bargaining units; it merely presents the proposed amendment to voters. However, there was no showing that this distinction requires a different approach to the meet and confer requirements in the MMBA. Nothing in the *City of Seal Beach*, *supra*, 36 Cal.3d 591 decision specifies that the parties' bargaining obligations should be treated differently in these cases. This argument is therefore unpersuasive.

The City also argues that complying with the impasse processes is impracticable because charter cities typically only create one charter amendment that will apply to multiple bargaining units. This position is unpersuasive for at least three reasons based on the record presented here. First, the City did not establish the need behind its decision to have only a single charter amendment for all of its 11 bargaining units. Nor was there evidence about the impracticability of having separate amendments for its various bargaining units or, at least, its two pension plans. The City should not be allowed to evade aspects of its bargaining obligations solely by the manner in which it crafts its charter amendment proposals.

Second, the exact situation described by the City actually arose in the *City of Seal Beach*, *supra*, 36 Cal.3d 591 case. The proposed charter amendments in that case applied to "any city employee who participated in a strike," (*Id.* at p. 595), but the court saw no reason to

exempt the defendant city from bargaining with the plaintiffs, as required by MMBA section 3505.

Third, the facts in this case appear to show the City's bargaining obligation to multiple bargaining units actually facilitated discussions about the proposed charter amendment in this case. The record shows that the City's units formed coalitions during bargaining with Local 230 and the POA sitting together at one table and Local 21 negotiated on behalf of three City bargaining units. In fact, City Director of Employee Relations Gurza testified that the City was able to use proposals developed in one set of negotiations during its negotiations with other unions. PERB has previously found coordinated bargaining among unions to be lawful. (*Compton Community College District* (1989) PERB Decision No. 728, proposed decision, pp. 62-63.) For all these reasons, the City's argument is rejected.[9]

Finally, the City asserts that it should not be required to bargain to and through impasse due to the strict statutory timelines required for qualifying a proposed charter amendment for an election. While it is conceivable that there might be some circumstances where a charter city may need to act on a charter amendment proposal within short period of time to capitalize on voter sentiment or some other kind of political tide, those circumstances must be proven with facts in the record. Facts supporting this argument were not presented here. Although

[9] The City also argues that subjecting charter amendment negotiations to the City's own local impasse procedures impermissibly conflicts with existing state statutory schemes covering charter amendments. Setting aside the fact that the City never identifies which State statutes conflict with its local impasse rules, it is in any event true that nothing in the impasse procedures in either the MMBA or the City's EERR requires the City to reach agreement with any union or change its stance over any charter amendment. Just as the court in *City of Seal Beach, supra*, 36 Cal.3d 591 concluded that the bargaining obligations under the MMBA do not conflict with a city's authority to propose charter amendments, it is also true that the City may exercise its authority to amend its charter after completing the EERR impasse procedures in good faith.

measures must be placed on the ballot at least 88 days before the election, the City retained complete discretion over the election date it chose. There was no evidence that anything other than City's own preferences prevented it from selecting an election date far enough into the future in order to its bargaining obligations under MMBA section 3505. (See *Lucia Mar Unified School District* (2001) PERB Decision No. 1440, proposed decision, p. 47 [holding that self-imposed deadlines for making a final decision on negotiable subjects does not excuse a respondent's bargaining obligations].) The City's argument is accordingly rejected.

City of Seal Beach, *supra*, 36 Cal.3d 591 requires a charter City to satisfy its duty to meet and confer in good faith with affected unions before proposing the charter amendments concerning issues within the scope of representation. (See *Id.*, at p. 602.) The meet and confer requirements under MMBA section 3505 includes allowing for adequate time to resolve impasses. The City was therefore required to fulfill all the bargaining obligations under MMBA section 3505 prior to proposing a charter amendments concerning negotiable subjects in a local election.

B. The Prima Facie Case for a Unilateral Change

Local 230 alleges that the City approved Resolution No. 76087 prior to completing required bargaining. That resolution called for a City-wide election over charter amendments to change unit members' retirement benefits. It has long been held that a party commits a "per se" violation of the duty to meet and confer in good faith where the following elements are met: (1) the employer took action to change existing policy; (2) the policy change concerned a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; and (4) the change has a generalized effect or continuing impact on terms and conditions of employment. (*Fairfield-*

Suisun Unified School District (2012) PERB Decision No. 2262, p. 9, citing *Grant Joint Union High School District* (1982) PERB Decision No. 196, p. 10; *Walnut Valley Unified School District* (1981) PERB Decision No. 160, p. 5; see also *Vernon Fire Fighters, Local 2312, IAFF v. City of Vernon* (1980) 107 Cal.App.3d 802 (*City of Vernon*), pp. 822-823; *County of Santa Clara* (2013) PERB Decision No. 2321-M, pp. 12-13.) These same principles apply when a public agency seeks to change matters with the scope of representation via ballot measure. (*County of Santa Clara, supra*, PERB Decision No. 2120-M, p. 9, citing *City of Seal Beach, supra*, 36 Cal.3d 591.)

There is no dispute that Local 230 satisfied the first three elements of the above-referenced unilateral change test. The City took official action to approve Resolution No. 76087 at its December 6, 2011 City Council meeting. The parties also do not dispute that the vanguard of the City's proposed charter amendments concern changes to contribution rates, retirement eligibility age, and post-employment benefits for current and future employees. Post-employment benefits for current and future employees are mandatory subjects of bargaining. (*County of San Joaquin* (2003) PERB Decision No. 1570-M, p. 7, citing *Temple City Unified School District* (1989) PERB Decision No. 782, *Jefferson School District* (1980) PERB Decision No. 133.) It is also clear that the City's proposed changes were intended to apply on a continuing basis for employees once passed by the local electorate. (See *State of California (Departments of Veterans Affairs & Personnel Administration)* (2008) PERB Decision No. 1997-S, p. 18 [holding that a change has a generalized effect "where there is a change in policy that is generally acceptable to future situations"].) The parties dispute whether the City provided a sufficient amount of time and opportunity for bargaining prior to adopting Resolution No. 76087. That issue will be addressed below.

1. Effect of the Pledge of Cooperation

In most cases, the duty to bargain requires that the parties refrain from unilateral action on negotiable matters until the parties reach either agreement or impasse, unless a party has waived its right to negotiate the over those matters. (*County of Santa Clara* (2010) PERB Decision No. 2114-M, p. 13, citing *Omnitrans* (2009) PERB Decision No. 2001-M.) In this case, the parties disagree about whether they reached impasse in negotiations on or around October 31, 2011. Determination of a bona fide impasse in negotiations is a question of fact and is typically based on a variety of factors such as the number and length of negotiating sessions, the time period over which negotiations have occurred, the extent to which the parties have made or discussed proposals and reached tentative agreements, and the extent to which issues in negotiations remain unresolved. (PERB Regulation 32793(c); *County of Riverside* (2014) PERB Decision No. 2360-M, p. 14.) PERB defines impasse as the point at which further negotiations would be either "fruitless" or "futile" because the parties have each considered the other's proposals and counterproposals in a good faith attempt to reach agreement, but nevertheless remain "deadlocked" in their respective positions. (*County of Riverside*, citations omitted.) City EERR section 2(l) defines impasse similarly.

In this case, neither party maintains that the parties met the definition of impasse used by PERB or the City's EERR. Rather, the City asserts that impasse was an "automatic" function of the Pledge of Cooperation, which states in relevant part:

> The parties agree to meet and confer in good faith and agree to complete the negotiation process by October 31, 2011. If the parties are unable to reach an agreement on retirement reform and/or related ballot measure(s) by October 31, 2011, the parties shall proceed to impasse, pursuant to procedures outlined in the [EERR section 23].

Local 230 contends, on the other hand, that the parties never agreed that negotiations would be at impasse on October 31, 2011; they only agreed to utilize the impasse procedures contained in the EERR. EERR section 23 does not require that the parties meet the EERR definition of impasse before they resort to its impasse procedures. It only requires that "a bona fide effort has been made to meet and confer in good faith and such efforts fail to resort in agreement."

The MMBA has no strict timelines for completing the meet and confer process. Instead, MMBA section 3505 only requires that negotiations "continue for a reasonable period of time" and "include an adequate time for the resolution of impasses" through procedures that are either required or agreed upon by the parties. Neither party may avoid its bargaining obligations by unilaterally setting deadlines for completing negotiations. (*County of Riverside, supra*, PERB Decision No. 2360-M, p. 20, citations omitted.) On the other hand, the court in *Santa Clara County Correctional Peace Officers' Assn., Inc. v. County of Santa Clara* (2014) 224 Cal.App.4th 1016 (*County of Santa Clara/CPOA*) recently found that parties "are free to agree in advance on a period of time that they consider reasonable to allow them to freely exchange information and proposals and endeavor to reach agreement." (*Id.* at pp. 1038-1039, review den. July 9, 2014.) In that case, the parties entered into an agreement permitting the county to convert employees' existing schedules to either a 4/10 or a 5/8 schedule:

> upon the giving of forty-five (45) calendar days' advance notice of such change to the Association, which shall be afforded the opportunity to meet and confer on such a proposed change prior to implementation.

(*Id.* at p. 1024.) The court in that case rejected the county's argument that the agreement amounted to a clear and unmistakable waiver of the right to meet and confer over schedule changes. The court instead concluded that the above-quoted language constituted a binding

agreement to complete negotiations 45 days. The court further found that the 45-day period was not an "arbitrary deadline" for finishing bargaining under the facts of that case, apparently a prerequisite to making such an agreement binding. (*Id.* at p. 1039.)

Notably, the court in *County of Santa Clara/CPOA*, *supra*, 224 Cal.App.4th 1016 also interpreted the parties' agreement to cover all aspects of their meet and confer requirements. Thus, while the court believed that 45 days was a sufficient to complete for any pre-impasse bargaining, the court found it unreasonable to expect the parties to also complete county's local impasse procedures set forth in that county's local rules within that time period.[10] The court accordingly concluded that "[i]t therefore appears that the parties did not intend the impasse resolution procedure to apply to this particular proposal," finding instead that the parties agreed to "implementation of the County's proposal 45 days after providing notice, regardless of whether the parties reach agreement or impasse on implementation in the interim." (*Id.* at p. 1039.) In other words, the union under those facts "waive[d] any right to postpone implementation beyond 45 days by declaring impasse and compelling mediation." (*Ibid.*)[11]

PERB may review parties' contracts only to the extent necessary to decide issues within its jurisdiction, such as unfair practice charges. (*County of Sonoma* (2012) PERB Decision No. 2242-M, p. 15, citing *Regents of the University of California (Davis)* (2010) PERB

[10] The impasse procedure in the county's local rules in *County of Santa Clara/CPOA*, *supra*, 224 Cal.App.4th 1016, provided for mandatory mediation, unless another procedure is agreed upon by the parties. (*Id.* at p. 1036.) The impasse mediation procedures in City EERR section 23, once invoked, do not allow the parties to agree to opt out of mediation.

[11] But see *Redwoods Community College District* (1996) PERB Decision No. 1141, proposed decision, pp. 12-15 [holding that parties subject to a different collective bargaining statute may not agree to opt out of statutorily required impasse procedures].)

Decision No. 2101-H, *County of Ventura* (2007) PERB Decision No. 1910-M.) When such review is warranted, PERB applies traditional principles of contract interpretation. Those principles include interpreting agreements in a manner that effectuates the parties' mutual intentions at the time of agreement and looking first to the plain language of the agreement when trying to determine its meaning. (*Id.*, citing Civ. Code, §§ 1636, 1638.) If the plain meaning of the contract language is clear and unambiguous, no further evidence is required to interpret the agreement. Furthermore, the language of the agreement must be read together as a whole. (*Id.* at pp. 15-16.)

In the present case, the parties agree that interpreting the Pledge of Cooperation is relevant to the status of the parties' negotiations at the end of 2011. The unambiguous language of the Pledge of Cooperation shows that the parties clearly intended to set parameters about the length of pre-mediation negotiations on retirement reform. According to the court in *County of Santa Clara/CPOA*, *supra*, 224 Cal.App.4th 1016, the parties were permitted to do so.[12] Local 230 argues that the reference to October 31 represented only a nonbinding "goal" to finish negotiations, but that interpretation cannot be squared with the plain language of the

[12] The court in *County of Santa Clara/CPOA*, *supra*, 224 Cal.App.4th 1016 notably did not reach the issue of whether the parties could stipulate beforehand when they will reach the legal status of "impasse" in negotiations. Nothing in the agreement in that case indicated anything about when they would reach "impasse." (*Id.* at p. 1024.) Likewise, in the present case, although the Pledge of Cooperation specifies that the parties shall proceed *to impasse*, i.e., to the impasse resolution procedures in City EERR section 23, nothing in the agreement dictates that the parties would be *at impasse*, i.e., at a deadlock in discussions regarding negotiable matters (EERR,§ 2(l)), by a certain date. Moreover, that question is inconsequential to the decision in this case because the parties may agree to complete bargaining within a reasonable fixed time period, irrespective of impasse. Therefore, although it is unlikely that well-settled concepts of collective bargaining would allow parties to agree in advance when negotiations will be deadlocked or otherwise at loggerheads, it is unnecessary to decide that issue in this proposed decision.

agreement. The statement that "[t]the parties agree to meet and confer and good faith and agree to complete the negotiations process by October 31, 2011" is not subject to multiple interpretations. Therefore, while it is not technically correct that the parties reached "impasse" on October 31, 2011, I find that the parties clearly agreed to complete pre-mediation bargaining by that date.[13]

I also find that, unlike the parties in *County of Santa Clara/CPOA*, *supra*, 224 Cal.App.4th 1016, the parties in this case did not intend to waive their right to use the impasse mediation process under EERR section 23. To the contrary, the parties plainly agreed to use that process if no agreement was reached before October 31, 2011. The Pledge of Cooperation did not specify a time for completing impasse procedures.

While extrinsic evidence is not required to understand how the parties intended the Pledge of Cooperation to operate, outside evidence does explain why the parties selected October 31, 2011, as the operative date. The agreement refers to, but does not detail, the City's interest in pursuing a ballot measure. Other documents and witness testimony show that the parties chose October due to statutorily mandated timelines for placing a proposed charter amendment on a local ballot. At the time of they signed the agreement, the City earmarked March 6, 2012, for the election, meaning the City Council had to approve the proposed

[13] The City suggests in briefing that the issue of whether the parties reached impasse via the Pledge of Cooperation was conclusively decided by the Santa Clara Superior Court in its June 17, 2013 order compelling interest arbitration. However, the court in that case correctly recognized that it lacked jurisdiction to decide whether the parties had completed negotiations in good faith and expressly declined to rule on that issue. PERB has exclusive initial jurisdiction to decide whether an employer covered by the MMBA failed to satisfy its meet and confer obligations under MMBA section 3505. (*San Diego Municipal Employees Assn. v. Superior Court* (2012) 206 Cal.App.4th 1447, p. 1457.) Thus, the court did not and could not determine whether the parties ever reached a bona fide impasse relieving them of any bargaining obligation.

amendments by December 9, 2011. The record shows that the parties selected October 31, 2011, to allow time for negotiations before December 9, 2011.

3. Reinstating the Duty to Bargain

Under normal circumstances, the duty to bargain in good faith is ongoing and continuous. (*County of Contra Costa*, *supra*, PERB Order No. Ad-410-M, pp. 23, 38, administrative determination, pp. 7-8, citing *Conley v. Gibson* (1957) 355 U.S. 41, p. 46; *NLRB v. Acme Indus. Co.* (1967) 385 U.S. 432, pp. 435-436.) Even impasse in negotiations is impermanent. As the court in *PERB v. Modesto City Schools District* (1982) 136 Cal.App.3d 881 observed, "impasse is a fragile state of affairs and may be broken by a change in circumstances that suggest that attempts to adjust differences may no longer be futile." (*Id.* at p. 899.) Once impasse is broken, the duty to bargain revives. (*Ibid.*; see also *Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231-M (*Stanislaus CFPD I*), p. 13, fn. 14.) The Board discussed the reasoning behind this policy in *Modesto City Schools*, *supra*, PERB Decision No. 291. That case involved the parties' duty to bargain after formal impasse procedures concluded under Educational Employment Relations Act (EERA). (*Id.* at p. 32.) The Board found the fundamental purpose behind the meet and confer requirement in the public sector is to encourage face-to-face meetings and ultimately bring about peaceful negotiated agreements. (*Modesto City Schools*, *supra*, PERB Decision No. 291 at pp. 34-35.) The Board cited language from EERA in support, stating that its purpose is "'to promote the improvement of personnel management and employer-employee relations[.]'" (*Id.* at p. 35, quoting Gov. Code, § 3540.)[14] In a similar way, the Board found that formal codified

[14] MMBA section 3500(a) and City EERR, section 1 both contain language nearly identical to the quoted portion of Government Code section 3540.

impasse procedures ensures that parties fully explore the possibility for concessions, compromises, and settlement before taking unilateral action such as imposition of terms, strikes, or lockouts. (*Id.* at pp. 36-37.) Thus, concluded the Board, reviving the duty to bargain in the face of "changed circumstances" was a necessary component of the duty to bargain in good faith. (*Id.* at p. 38, citing *Modesto City Schools District*, *supra*, 136 Cal.App.3d at p. 899.) The same principles apply in impasses occurring under the MMBA. (See *Stanislaus CFPD I*, *supra*, PERB Decision No. 2231-M, p. 13, fn. 14; see also *City & County of San Francisco* (2009) PERB Decision No. 2041-M, proposed decision, p. 27.)

In the present case, the parties entered into the EERR impasse mediation process pursuant to their agreement in the Pledge of Cooperation, not because the parties reached a bona fide impasse in negotiations. One issue presented in this case is whether the duty to bargain at the end of impasse procedures under these circumstances may "revive" in the same sense as it does had the parties actually bargained to impasse. There is good reason to view these two situations similarly. As the court found in *County of Santa Clara/CPOA*, *supra*, 224 Cal.App.4th 1016, parties may agree in advance on what constitutes a "reasonable period of time" for negotiations under MMBA section 3505. (*Id.* at pp. 1038-1039.) The parties in this case reached such an agreement, but nothing in the terms of that deal absolved the parties of the remainder of their bargaining obligations. Based on the unvarying precedent set in *Modesto City Schools District*, *supra*, 136 Cal.App.3d *881, Stanislaus CFPD I*, *supra*, PERB Decision No. 2231-M, *City & County of San Francisco*, *supra*, PERB Decision No. 2041-M, and *Modesto City Schools*, *supra*, PERB Decision No. 291, the parties remained obligated to fully explore the possibility for agreement in order to avoid the disruption of valuable public services that may occur at the conclusion of all bargaining. (*City & County of San Francisco*,

supra, PERB Decision No. 2041-M, proposed decision, p. 27; *Modesto City Schools*, *supra*, PERB Decision No. 291 at pp. 34-35.) A key component of that obligation is the duty to consider how new circumstances affect the possibility for agreement. (*Modesto City Schools* at p. 38, citing *Modesto City Schools District*, *supra*, 136 Cal.App.3d at p. 899.) The alternative, i.e., allowing parties who have agreed to a bargaining schedule in advance to ignore how new information or circumstances might lead to agreement, is at odds with the core purpose of collective bargaining. Moreover, as the facts in this case show, new circumstances may alter the purpose behind the parties' negotiations timetable. Therefore, I conclude that the parties' duty to bargain in good faith may revive in the face of changed circumstances even though they agreed on a time limit for pre-mediation negotiations.

The facts of this case illustrate the merit of this conclusion. It is undisputed that the purpose of the timelines in the Pledge of Cooperation was to allow for negotiations ahead of December 9, 2011, when the City planned on finalizing its ballot for a March 6, 2012 election. As will be discussed in greater detail below, circumstances at the City changed in December 2011, causing the City Manager, the Mayor, and a majority of the City Council to move the election from March 6 to June 5, 2012. As Gurza put it, "the urgency of the matter to go in March lessened, and that was part of the reason the Council was willing to agree to move [the proposed charter amendment] to the June election." Put another way, the purpose behind the timelines in the Pledge of Cooperation was undercut by subsequent events.

In addition, nothing in the Pledge of Cooperation indicated a waiver of the right to either participate in the impasse process fully or to waive the right to subsequent bargaining should circumstances change. To the contrary, the parties expressly declined to waive any legal rights when signing the agreement. The City's EERR does not even allow the parties to

circumvent impasse mediation, once invoked. Under these facts, it is unreasonable to allow the parties to ignore any new developments when evaluating their ongoing bargaining obligations. Therefore, the City and Local 230 were obligated to consider how new events affected their ability to reach agreement.

3. The Existence of "Changed Circumstances" in This Case

The Board has defined "changed circumstances" as "those movements or conditions which have a significant impact on the bargaining equation." (*Modesto City Schools*, *supra*, PERB Decision No. 291, p. 35.) However, in *State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2102-S (*DPA*), PERB was reticent to conclude that the mere occurrence of supervening events is sufficient to revive the duty to bargain post-impasse. (*Id.* at proposed decision, pp. 8-9.) Rather, there must be "substantial evidence that a party is committed to a new bargaining position." (*Id.* at proposed decision, p. 8, citing *Serramonte Oldsmobile, Inc. v. NLRB* (D.C. Cir. 1996) 86 F.3d 227, p. 233.)

Most commonly, "changed circumstances" break impasse when significant bargaining concessions "'open a ray of hope with a real potentiality for agreement if explored in good faith in bargaining sessions.'" (*Modesto City Schools*, *supra*, PERB Decision No. 291, p. 39, quoting *NLRB v. Webb Furniture* (4th Cir. 1966) 366 F.2d 314, p. 316 (*Webb Furniture*); *Modesto City Schools District*, *supra*, 136 Cal.App.3d at p. 899; *City of Santa Rosa* (2013) PERB Decision No. 2308-M, p. 6, fn. 2.) If one party makes a concession during impasse, the other party must consider the new proposal in good faith. (*Modesto City Schools*, p. 39; see also *Saddleback Valley Unified School District* (2013) PERB Decision No. 2333, p. 11, proposed decision, pp. 14-15.) Even if the conceding party's proposal is not fully acceptable, the reviewing party must attempt to determine whether concessions made were significant

enough to relieve the impasse and reinstate the duty to bargain. (*Modesto City Schools*, p. 39.) On the other hand, "either party is free to conclude that it has made all the concessions it can and further negotiations are futile." (*Ibid.*) Thus, in *Modesto City Schools*, the Board found that an employer violated the duty to bargain in good faith after it failed to review a neutral factfinders' report with recommendations for resolving their impasse and also refused to meet with the union and consider newly proposed concessions. (*Id.* at p. 44.)[15] The proposed concessions in that case included acceding to the employer's position on the length of the agreement, minimum class sizes, and transfer policies, as well as other proposals recommended by the factfinding report. (*Id.* at pp. 39-40.) In contrast, in *Charter Oak Unified School District* (1991) PERB Decision No. 873, the Board held that an employer was not obligated to physically meet over the charging party's proposal to accept a factfinding panel's recommendations because the employer had already rejected those recommendations in a written dissent to the panel's report. (*Id.* at pp. 11-12.)

In this case, the parties completed pre-mediation bargaining around the end of October 2011. The parties then participated in two mediation sessions in November 2011, but concluded that process without making additional proposals or reaching agreement. After mediation ended, both parties made new proposals containing concessions. In its November 18, 2012 proposal, Local 230 acquiesced to the City's demand to bring any changes to retirement benefits before City voters. Local 230 also abandoned its proposal to move aspects of the Police and Fire plan to CalPERS. Both of these issues had been major stumbling blocks in prior meetings. The City's November 22, 2011 proposal also moved the parties closer to

[15] The Board also found that the employer's conduct violated the duty to participate in impasse procedures in good faith. (*Ibid.*)

agreement. That proposal included more favorable retirement benefits accrual rates, a lower minimum retirement age, and an increase to maximum COLA payments. The City withdrew entirely its "Safety Net" provisions, which could have severely curtailed the City's ability to provide various types of discretionary salary increases and other employee benefits without voter approval. On November 29, 2011, Local 230 specifically demanded to bargain over the City's new proposal. The City did not reply to that demand. Both parties also made additional proposals in December 2011. The duty to bargain in good faith required that the parties at least consider whether these new developments created the possibility of further movement at the bargaining table. Yet, the parties never met or held other discussions on any of these proposals before the City adopted Resolution No. 76087 on December 6, 2011. It was not even made clear for the record the extent to which the City even considered Local 230's post-mediation proposals before it adopted Resolution No. 76087.

The City argues that the duty to bargain never revived because it was undisputed that none of the post-mediation proposals were mutually acceptable by the parties. However, the duty to bargain in good faith may reactivate even by concessions that do not wholly resolve the issues in dispute. Rather, "[e]ven if not fully acceptable, a good faith effort must be made to determine if the new proposals are significant enough to 'relieve the impasse and open a ray of hope with a real potentiality for agreement if explored in good faith bargaining sessions.'" (*Modesto City Schools*, *supra*, PERB Decision No. 291, p. 39, quoting *Webb Furniture*, *supra*, 366 F.2d 314.) During the hearing, the City's negotiators admitted that it viewed Local 230's new proposals as a "positive sign." The City also admitted that its own proposal contained "significant changes" from its earlier position. Thus, even if it were true that neither party's concessions completely resolved their disagreement, the parties nevertheless had the obligation

to consider the new proposals and explore whether there was some basis for progress in negotiations.

In addition to the parties' proposed concessions, Cheiron, the Police and Fire Plan actuary, released new pension cost projections on or around December 1, 2011. Cheiron projected that the City's 2011-2012 pension costs would be around $55 million less than predicted earlier. Unlike in *DPA*, *supra*, PERB Decision No. 2102-S, the new valuation was not merely a new event with an uncertain impact on the parties' bargaining positions. The City admits that its bargaining position was based, in part, on its perceived urgency to put the issue before voters in March 2012. Yet, as Gurza later said, the "urgency of the matter to go in March lessened" after reviewing Cheiron's updated projections.

The duty to meet and confer in good faith under MMBA section 3505 obligated the parties in this case to explore whether the post-mediation events in 2011 provided some basis for believing "that attempts to adjust differences may no longer be futile." (*Modesto City Schools District*, *supra*, 136 Cal.App.3d at p. 899.) The evidence in this case shows that the City did not satisfy this obligation, despite Local 230's requests.

4. The City Council's Approval of Resolution No. 76087

The City Council approved of Resolution No. 76087 during its December 6, 2011 City Council meeting. The City acknowledges this fact but argues that the parties had fully exhausted any bargaining obligation by that point because the parties remained unable to reach agreement despite lengthy negotiations. It contends that, after this process, it was privileged to impose its last, best, and final offer. The City admits that the terms approved in Resolution No. 76087 were based on its December 5, 2011 draft, not its November 22, 2011 proposal. It further admits that the parties never met or discussed the December 5 draft. The City argues

that unilateral action was nevertheless justified because the terms imposed were reasonably comprehended within its November 22, 2011 proposal, what it now calls its last, best, and final offer.[16] This argument is unpersuasive because the undisputed evidence in the record shows that the parties also never bargained or otherwise discussed the City's November 22, 2011 proposal. Furthermore, the City also adopted Resolution No. 76087 before considering whether either Local 230's own post-mediation concessions or Cheiron's more favorable cost valuations provided the opportunity for further progress in negotiations.

To the extent that the City defends its conduct by arguing that the terms of No. 76087 never took effect, that position was considered and rejected in *County of Sacramento* (2008) PERB Decision No. 1943-M. There, a county employer unilaterally changed the eligibility requirements for its retiree health care program. (*Id.* at pp. 7-8.) The employer later rescinded those changes prior to their effective date. (*Id.* at p. 9.) The Board dismissed the argument that the rescission defeated the union's unilateral change claim, holding instead that "[t]he fact that the County reversed its position and restored the status quo before the new policy went into effect, does not cure the unlawful unilateral change." (*Id.* at p. 12; see also *Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231a-M (*Stanislaus CFPD II*), p. 8.) The same result is required here. The City Council approved Resolution No. 76087 on December 6, 2011, before fully satisfying its duty to meet and confer in good faith. The fact that the City delayed action on that resolution and later repealed it is of no consequence. The parties stipulated that the proposed charter amendments from Resolution No. 76087 would have been placed on the City's June 5, 2011 ballot unless repealed by the City Council.

[16] It is noteworthy that the City never informed Local 230 that the November 22, 2011 was its last, best, and final offer. In fact, it did not even label that draft as a proposal.

Equally unpersuasive is the claim that the City's willingness to continue bargaining after approving Resolution No. 76087 excused any violation. In *Anaheim Union High School District* (1982) PERB Decision No. 201 (*Anaheim UHSD*), the Board held that unilateral changes to employees' salaries and benefits were "official and legally effective" when the school employer's board approved those changes, not at some later effective date. (*Id.* at p. 11.) It accordingly rejected the argument that the unilaterally approved changes were merely the employer's "unofficial initial proposal." (*Ibid.*) According to the Board,

> Were we to characterize an employer's action unilaterally reducing salaries as an "initial bargaining proposal" simply because it had a deferred effective date we would be legitimizing a tactic patently offensive to the statutory requirement of good faith bargaining.

(*Id.*; see also *Stanislaus CFPD II*, *supra*, PERB Decision No. 2231a-M, p. 8.) Likewise, in this case, the fact that the parties continued meeting after the City approved Resolution No. 76087 does not nullify the harm caused by the City's unilateral action.[17]

Local 230 has established all the elements of an unlawful unilateral policy change. Therefore, the adoption of Resolution No. 76087 violates the duty to meet and confer in good faith unless its conduct was excused. (*City of Sacramento* (2013) PERB Decision No. 2351-M, p. 38; *County of Sacramento* (2009) PERB Decision No. 2045-M, p. 4.)

III. The City Council's Approval of Resolution No. 76158

[17] But see *Omnitrans*, *supra*, PERB Decision No. 2001-M, where the Board found, at least for statute of limitations purposes, that a unilateral policy change occurs on the date a "charging party has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, provided that nothing subsequent to that date evinces a wavering of that intent." (*Id.* at p. 6.) In that case, the Board held that a unilateral change did not occur on the date alleged by the charging party because the employer stated that it would not implement the alleged changes until after it received feedback from the charging party's members. (*Id.* at p. 7.) No such assurances were made by the City in the present case.

Local 230 also contends that the City violated the duty to meet and confer in good faith by approving Resolution No. 76158. According to Local 230, the City took this action prior to reaching bona fide impasse in negotiations. The City contends that, the parties simply could not reach agreement despite extensive negotiations, including mediation sessions after the City adopted Resolution No. 76087. The City cites as evidence the fact that each party's final proposal remained unacceptable to the other. As discussed below, the City's December 6, 2011 unilateral change impermissibly tainted the parties' later bargaining efforts and completely frustrated the parties' later bargaining.

The Board has held that "a bona fide impasse exists only if the employer's conduct is free from unfair labor practices; its right to impose terms and conditions at impasse is therefore dependent on prior good-faith negotiations *from their inception through exhaustion of statutory or other applicable impasse resolution procedures*." (*City of San Jose* (2013) PERB Decision No. 2341-M, pp. 39-40 [emphasis in original], citing *Temple City Unified School District* (1990) PERB Decision No. 841 (*Temple City USD*).) In *San Mateo County Community College District* (1979) PERB Decision No. 94 (*San Mateo County CCD*), the Board detailed the corrosive effects one party's unilateral action has on bargaining. That case concerned an employer's unilateral imposition of a 6.25 percent salary reduction following "informal talks" with the union, but no actual bargaining. (*Id.* at pp. 7-8.) The Board described the employer's conduct as having a "destabilizing and disorienting impact on employer-employee relations." (*Id.* at pp. 14-15, citing *Fibreboard Paper Products Corp. v. NLRB* (1964) 379 U.S. 203, p. 211.) This is because:

> An employer's single-handed assumption of power over employment relations can spark strikes or other disruptions at the work place. Similarly, negotiating prospects may also be damaged as employers seek to negotiate from a position of

> advantage, forcing employees to talk the employer back to terms previously agreed to. This one-sided edge to the employer surely delays, and may even totally frustrate, the process of arriving at a contract.

(*Id.* at p. 15; see also *Moreno Valley Unified School District v. PERB* (1983) 142 Cal.App.3d 191, pp. 199-200; *County of Santa Clara, supra*, PERB Decision No. 2321-M, p. 23.)

In addition, an employer's "unilateral actions derogate the representative's negotiating power and ability to perform as an effective representative in the eyes of employees." (*San Mateo County CCD, supra*, PERB Decision No. 94, p. 15.) Such conduct undermines an exclusive representative's ability to fairly represent all of its bargaining unit. (*Id.*, citing *NLRB v. Katz* (1962) 369 U.S. 736, p. 744; see also *County of Santa Clara, supra*, PERB Decision No. 2321-M, p. 23.)

A third reason for disfavoring unilateral changes is that "[s]uch changes also upset the delicate balance of power between management and employee organizations painstakingly established by our statutes. '[T]he bilateral duty to negotiate is negated by the assertion of power by one party through unilateral action on negotiable matters.'" (*County of Santa Clara, supra*, PERB Decision No. 2321-M, p. 23, quoting *San Mateo County CCD, supra*, PERB Decision No. 94, p. 16.)

Finally, unilateral action "may also unfairly shift community and political pressure to employees and their organizations, and at the same time reduce the employer's accountability to the public." (*San Mateo County CCD, supra*, PERB Decision No. 94, p. 16; see also *County of Santa Clara, supra*, PERB Decision No. 2321-M, p. 23.)

In another case, the Board held that "where an employer unilaterally changes a working condition which is at the time a subject of negotiations, the required element of good faith on the part of the employer is destroyed." (*Antioch Unified School District* (1985) PERB

Decision No. 515, pp. 18-19, citing *Amador Valley Joint Union High School District* (1978) PERB Decision No. 74; see also *Los Angeles Unified School District* (1990) PERB Decision No. 860, proposed decision, p. 26 ["As a practical matter, it is clear that . . . a unilateral action alters the balance of bargaining power held by the parties."].)

The Board's forceful denunciation of unilateral action is not mere hyperbole. As the court found in *City of Vernon, supra*, 107 Cal.App.3d 802, "the employer's fait accompli thereafter makes impossible the give and take that are the essence of labor negotiations." (*Id.* at p. 823.) Thus, later offers to bargain after the change cannot cure the defect. (*Stanislaus CFPD I, supra*, PERB Decision No. 2231-M, p. 13; *State of California (Department of Personnel Administration)* (1993) PERB Decision No. 995-S, proposed decision, p. 22.) The Board explained the reasoning behind this position in *Dry Creek Joint Elementary School District* (1980) PERB Order No. Ad-81a (*Dry Creek JESD*), a case involving the Board's review of an arbitration award. There, the arbitrator found that the employer violated sections of the parties' collective bargaining agreement by changing negotiated salary provisions. (*Id.* at pp. 2-3, 5.) The arbitrator ordered the parties to negotiate over salary issues, but declined to first reverse the imposed changes. (*Id.* at p. 7.) In its review of that award, the Board stated "PERB has made it clear--and now reiterates--that good faith negotiations cannot and should not proceed until the status quo is restored." (*Id.* at p. 8, citing *San Mateo County CCD, supra*, PERB Decision No. 94; *San Francisco Community College District* (1979) PERB Decision No. 105.) Thus, the Board concluded that the "arbitrator's remedy, which only directs that the parties enter into negotiations, would therefore require that the employees and their representative enter negotiations on the basis of first surrendering fundamental statutory rights to bargain in good faith." (*Id.* at p. 9.) The Board found that such an award was repugnant to

the very purposes of public sector collective bargaining,[18] reasoning that the award, "if allowed to stand, would throw the parties negotiating relationship into an imbalance that would necessarily frustrate the Act's intent that negotiations proceed in good faith." (*Id.* at p. 9.) Using similar reasoning, the Board later held an employer is "not entitled to implement its 'last, best and final' offer, having already illegally altered the status quo during the negotiations process." (*Temple City USD*, *supra*, PERB Decision No. 841; see also *Noel Corp.* (1994) 315 NLRB 905, p. 911 ["Although an employer who has bargained in good faith to impasse normally may implement the terms of its final offer, it is not privileged to do so if the impasse is reached in the context of serious unremedied unfair labor practices that affect the negotiations."], enf. den. on other grounds at *Noel Foods v. NLRB* (D.C. Cir. 1996) 82 F.3d 1113, p. 1121.)

In the present case, it is undisputed that Resolution No. 76087 remained in place throughout the parties' 2012 meetings. It was only rescinded when the City Council concurrently approved Resolution No. 76158. It is further undisputed that Resolution No. 76087 changed the status quo for the parties. The City states in closing brief that:

> the December 2011 ballot measure was not a "condition", but merely described the status quo that the measure adopted in December 2011 would go on the ballot unless something else were to occur to prevent this default action.

[18] *Dry Creek JESD*, *supra*, PERB Order No. Ad-81a was decided under EERA. As explained above, both EERA and the MMBA share the central purpose "to promote the improvement of personnel management and employer-employee relations" in the public sector. (See MMBA, § 3500(a); Gov. Code, § 3540.) Moreover, both EERA and the MMBA are part of the Legislature's effort to create uniform, statewide practices for resolving labor disputes. (See *City of Seal Beach*, *supra*, 36 Cal.3d at p. 600; *International Federation of Professional &Technical Engineers v. Bunch* (1995) 40 Cal.App.4th 670, p. 676.)

(City's Closing Brief, § B(4), p. 26, lines 21-23.) As the Board found in *County of Santa Clara*, *supra*, PERB Decision No. 2321-M and *San Mateo County CCD*, *supra*, PERB Decision No. 94, the City's unilateral change to the status quo upset the delicate balance established through the MMBA's the meet and confer requirements. The City's failure to repeal Resolution No. 76087 prior to commencing subsequent bargaining ensured that the balance remained in the City's favor throughout the 2012 mediation sessions. This environment was not conducive to good faith bargaining, because "good faith negotiations cannot and should not proceed until the status quo is restored." (*Dry Creek JESD*, *supra*, PERB Order No. Ad-81a, p. 8.) The record in this case shows that the City leveraged its advantage in its one and only offer in the subsequent meetings. It informed Local 230 that the City could place less favorable terms (from Resolution No. 76087) on the June 5, 2012 ballot unless Local 230 agreed to the relatively more favorable terms of the City's February 10, 2012 offer.

The damage in this case was not reduced by the fact that the City merely imposed proposed ballot measure language, instead of actual changes to unit members' retirement benefits. Unilateral changes are disfavored not only because of actual changes to employees' working conditions but also because of the harm to the bargaining process itself. (See *San Mateo County CCD*, *supra*, PERB Decision No. 94, pp. 14-16.) This harm exists even in cases where the implemented policy has not even taken effect. (*County of Sacramento*, *supra*, PERB Decision No. 1943-M, p. 12; *Anaheim UHSD*, *supra*, PERB Decision No. 201, p. 11.) The negotiations in this case were over the City's proposed ballot measure. The City improperly assumed control over those negotiations by unilaterally approving the draft measure in

Resolution No. 76087. Requiring Local 230 to participate in later negotiations from this fundamentally disadvantaged position is anathema to good faith negotiations.

The City correctly points out that it made additional concessions after it unilaterally adopted Resolution No. 76087, but as explained above, later bargaining does not unravel the harm from one party's unilateral action. (*Stanislaus CFPD I*, *supra*, PERB Decision No. 2231-M, p. 13. Likewise, in *Modesto City Schools*, *supra*, PERB Decision No. 291, the Board concluded that an employer's concessions offered as part of a fait accompli were not sufficient to overcome its earlier unlawful bargaining conduct. (*Id.* at pp. 42-43.) Here, the City made its February 10, 2012 offer already knowing that it achieved the changes it sought. At this point, it cannot be determined what progress might have been made in negotiations had the parties' 2012 negotiations started from status quo. (See *Temple City USD*, *supra*, PERB Decision No. 841, proposed decision, pp. 31-32 [holding that after an employer's unilateral change "the mutual dispute resolution process by definition ends because the employer loses incentive to participate in the process since it has already imposed terms it deemed satisfactory"].)

Accordingly, I conclude that any subsequent meetings after the City approved Resolution No. 76087 could not have occurred in good faith. The parties were therefore not at bona fide impasse at the time the City unilaterally approved Resolution No. 76158. This conduct therefore violates the duty to negotiate in good faith unless the City's bargaining obligations were excused. (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, p. 38; *County of Sacramento*, *supra*, PERB Decision No. 2045-M, p. 4)

Local 230 asserts other arguments in support of its bargaining claims. These include the assertion that the City's reference to the $650 million figure was misleading, the claim that

the February 10, 2012 offer in mediation differed from what the City approved as part of Resolution No. 76158, and the argument that the City failed to meet with Local 230 over its March 2, 2012 proposal. However, in light of the conclusion that good faith bargaining could not and should not have even began until the City rescinded Resolution No. 76087, it is unnecessary to fully evaluate the strength of these other arguments. Therefore, these other claims will not be addressed further.

IV. The City's Defense

The City defends both its unilateral approval of both Resolution No. 76087 and Resolution No. 76158 by arguing that it was excused from any bargaining obligations due to what it described as the "practical and legal requirement of a statutory deadline for submission of a ballot initiative." The City cites in support *Compton Community College District* (1989) PERB Decision No. 720 (*Compton CCD*), which outlined that an employer, "prior to agreement or exhaustion of impasse procedures, may implement a *nonnegotiable* decision after providing reasonable notice and a meaningful opportunity to bargain over the [negotiable] *effects* of that decision." (*Id.* at p. 14 (emphasis supplied).) That test was approved of and restated by the Board recently in *Trustees of the California State University* (2012) PERB Decision No. 2287-H. In that later case, the Board reiterated that the test allows for implementation of a "non-negotiable decision" prior to completing effects bargaining, when:

> (1)[the] implementation date [is] based on immutable deadline or important managerial interest, (2) notice of [the] decision and implementation date [is] given sufficiently in advance of implementation date to allow for meaningful negotiations prior to implementation, and (3) the employer negotiates in good faith prior to implementation and continues to negotiate afterwards on unresolved issues.

(*Id.* at p. 12, citing *Compton CCD.*)

The test from *Compton CCD*, *supra*, PERB Decision No. 720 does not apply here because it only appertains to an employer's implementation of *nonnegotiable* decisions. (*Id.* at p. 14; see also *Trustees of the California State University*, *supra*, PERB Decision No. 2287-H p. 12.) This test originates from Board Member Craib's dissenting opinion in *Lake Elsinore School District* (1988) PERB Decision No. 696 (*Lake Elsinore SD*). (*Compton CCD*, p. 15.)[19] The purpose of the test, according to Craib, is to prevent "[t]he indefinite postponement of implementation [of a nonnegotiable decision, which] would effectively undermine the employer's right to make the decision and would blur the distinction between decision and effects bargaining." (*Lake Elsinore SD*, Craib dissent, p. 24.) That reasoning is not relevant in the present case because it is undisputed that the parties' negotiations concerned *negotiable* matters such as post-employment benefits for current and future employees. The City's authority to make *nonnegotiable* decisions is not at issue.

Moreover, even if the test from *Compton CCD*, *supra*, PERB Decision No. 720 applied, the City would not have satisfied the elements of that test. The City contends that the statutory timelines required for placing a charter amendment on its local ballot created an "immutable deadline" under the first element of the test. A similar argument was considered and rejected in *County of Santa Clara*, *supra*, PERB Decision No. 2120-M. There, a county employer argued that statutory timelines for ballot measures created an imminent need to approve a prevailing wage measure without completing negotiations. It argued that further bargaining would have prevented the county from including that issue in its preferred election date. (*Id.* at pp. 16-17.) The Board rejected that argument because there was no evidence about the need to

[19] Board Member Craib was the lead author in *Compton CCD*, *supra*, PERB Decision No. 720.

proceed on the chosen election date. The mere fact that the employer favored a particular election date was not sufficient to excuse the county's bargaining obligations. (*Id.* at p. 17; see also *County of Santa Clara*, *supra*, PERB Decision No. 2114-M, pp. 15-16.)

In the present case, it is undisputed that the City Council needed to approve of any charter amendments by March 9, 2012 in order to qualify for the June 5, 2012 election. But the City never explained the need for proceeding with the election in June 2012, as opposed to some later date after fulfilling any bargaining obligations. Without this evidence, I cannot conclude that the City had an immutable deadline or other important interest to act unilaterally. In addition, the test in *Compton CCD*, *supra*, PERB Decision No. 720 serves to excuse an employer from completing bargaining; it does not excuse bad faith conduct earlier in the negotiations process. For the reasons discussed in greater detail above, the City has also not established that it bargained with Local 230 in good faith prior to approving either Resolution No. 76087 or Resolution No. 76158. Thus, the City has failed to satisfy the third element of the test from *Compton CCD*.

The City also argued in its answer to the PERB complaint that its bargaining obligation was excused under PERB's business necessity doctrine. It raised no arguments supporting that defense in its closing briefs and for that reason it is considered to be abandoned. Even if that was not the case, the City did not demonstrate that it faced an "an actual financial emergency which leaves no real alternative to the action taken and allows no time for meaningful negotiations before taking action." (*Calexico Unified School District* (1983) PERB Decision No. 357, proposed decision, p. 20, citing *San Francisco Community College District*, *supra*, PERB Decision No. 105; see also *City of Davis* (2012) PERB Decision No. 2271-M, proposed decision, pp. 24-25.) Although the City clearly expressed a general interest in stemming the

growth of its pension costs as soon as possible, there was no evidence that this concern rose to emergency proportions when it approved Resolution No. 76087 on December 6, 2011, or when it approved Resolution No. 76158 on March 6, 2012. It also did not prove the existence of any emergency by the June 5, 2012 election date. In fact, the evidence suggests to the contrary. In early December 2011, the Pension Plans' actuary projected lower pension costs and the very people within the City that supported the charter amendments also recommended delaying the election and delaying any declaration of a fiscal and/or service level emergency. No emergency was ever declared at the times relevant to this case. No evidence was presented about the need to place the retirement reform issues on the City's June 2012 ballot. Under the facts presented in this case, the City's generalized concern about pension costs was not sufficient to qualify as an emergency that excused its bargaining obligations. (*City of Long Beach* (2012) PERB Decision No. 2296-M, p. 26-28.)

After reviewing the record as a whole, I conclude that the City did not satisfy its obligations meet and confer in good faith with Local 230 prior to approving either Resolution No. 76087 or Resolution No. 76158. The City has not established that any valid defense excusing its duty to bargain. Therefore, the City's conduct violates the duty to meet and confer in good faith under MMBA sections 3503, 3505, 3506, and 3506.5(a), (b), and (c) as well as PERB Regulations 32603(a), (b), and (c). (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, p. 38; *County of Sacramento*, *supra*, PERB Decision No. 2045-M, p. 4.)

REMEDY

MMBA section 3509(b) authorizes PERB to order "the appropriate remedy necessary to effectuate the purposes of this chapter." (*Omnitrans* (2010) PERB Decision No. 2143-M, p 8.) This includes an order to cease and desist from conduct that violates the MMBA. (*Id.* at p. 9.)

PERB's remedial authority includes the power to order an offending party to take affirmative actions to effectuate the purposes of the MMBA. (*City of Redding* (2011) PERB Decision No. 2190-M, pp. 18-19.)

PERB also has the authority to order the City to restore the status quo ante and rescind any unilaterally adopted policy changes. In *California State Employees' Association v. PERB* (1996) 51 Cal.App.4th 923, p. 946, the court found:

> Restoration of the status quo is the normal remedy for a unilateral change in working conditions or terms of employment without permitting bargaining members' exclusive representative an opportunity to meet and confer over the decision and its effects. This is usually accomplished by requiring the employer to rescind the unilateral change and to make the employees "whole" from losses suffered as a result of the unlawful change.

(Citations omitted; see also *County of Sacramento*, *supra*, PERB Decision No. 2045-M, pp. 3-4, citing *County of Sacramento*, *supra*, PERB Decision No. 1943-M.) Based on this authority, rescission of the unilaterally adopted resolutions is appropriate in this case with two important caveats. First, it is undisputed that the City rescinded Resolution No. 76087 before it took effect. Therefore, it is unnecessary to order rescission of the policies in that resolution. (See *County of Sacramento*, *supra*, PERB Decision No. 1943-M, pp. 12-13.)

Second, in *City of Palo Alto* (2014) PERB Decision No. 2388-M, the Board recently addressed its remedial authority in cases involving a city's violation of the MMBA in the context of a charter amendment election.[20] The Board found:

> We do not believe our remedial authority extends to ordering the results of an effective municipal election to be overturned. Such

[20] At that time this proposed decision issues, the Board's decision in *City of Palo Alto*, *supra*, PERB Decision No. 2388-M was subject to judicial review pursuant to MMBA section 3509.5. Nevertheless, the decision is the best example of PERB's position on the issue of remedies in cases involving the charter amendment process.

> remedy lies with the courts. (*Pala Band of Mission Indians v. Board of Supervisors* (1997) 54 Cal.App.4th 565, 574, 583; *IAFF v. City of Oakland* (1985) 174 Cal.App.3d 687, 698 [quo warranto writ is the exclusive remedy to attack procedural regularity by which charter amendments are put before electorate]; *City of Coronado v. Sexton* (1964) 227 Cal.App.2d 444, 453.) Based on the remedial authority which we do exercise under the MMBA, to wit, finding the City violated the MMBA and directing the City itself to rescind its July 18, 2011 resolution referring to voters the ballot measure, other persons, including the charging party here, may choose to seek such quo warranto relief.

(*Id.* at pp. 49-50.) In other words, when a city approved a ballot measure without bargaining in good faith, the Board has the authority to order it to rescind approval of that resolution. The Board however lacks the authority to rescind the results of the election that followed the resolution. Applying that reasoning to this case, the City is directed to rescind its March 6, 2012 approval of Resolution No. 76158. Local 230, or other affected entities or individuals, may thereafter pursue judicial remedies, as appropriate.

Additional appropriate remedies in this case include an order to cease and desist from conduct that violates the MMBA as well as an order to post a notice of this order, signed by an authorized representative of the City. These remedies effectuate the purposes of the MMBA because employees are informed that the City has acted in an unlawful manner, is required to cease and desist from such conduct, and will comply with the order. (*City of Selma* (2014) PERB Decision No. 2380-M, proposed decision, pp. 14-15.) The notice posting shall include both a physical posting of paper notices at all places where members of Local 230's bargaining unit are customarily placed, as well as a posting by "electronic message, intranet, internet site, and other electronic means customarily used by the [City] to communicate with its employees in the bargaining unit." (*Centinela Valley Union High School District* (2014) PERB Decision No. 2378, pp. 11-12, citing *City of Sacramento, supra*, PERB Decision No. 2351-M.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the City of San José (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505, 3506, and 3506.5(a), (b), and (c) and California Code of Regulations, title 8, sections 32603(a), (b), and (c). The City violated the MMBA by approving Resolution Nos. 76087 and 76158 without satisfying its duty to meet and confer in good faith with International Association of Firefighters, Local 230 (Local 230). However, Local 230's claim that the City also violated Government Code section 3506.5(c) by knowingly providing Local 230 with inaccurate financial information resources is dismissed.

Pursuant to section 3509(b) of the Government Code, it hereby is ORDERED that the City, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to meet and confer in good faith with Local 230 prior to adopting ballot measures involving changes to retirement benefits for current or prospective employees.

2. Interfering with Local 230's right to represent the members of its bargaining unit in employment relations with the City.

3. Interfering with the right of bargaining unit members to be represented by the employee organization of their own choosing.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Rescind the City's March 6, 2012 approval of Resolution No. 76158, concerning changes to retirement benefits for the Police and Fire bargaining unit.

2. Within 10 workdays of the service of a final decision in this matter, post copies of the Notice, attached hereto as an appendix, at all work locations where notices to employees in Local 230's bargaining unit customarily are posted. The Notice must be signed by an authorized agent of the City, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material. The Notice shall also posted by electronic message, intranet, internet site, and other electronic means customarily used by the City to communicate with employees in Local 230's bargaining unit.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Local 230.

Right to Appeal

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CE-969-M, *International Association of Firefighters, Local 230 v. City of San José*, in which all parties had the right to participate, it has been found that the City of San José (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. by approving Resolution Nos. 76087 and 76158 without satisfying its duty to meet and confer in good faith with International Association of Firefighters, Local 230 (Local 230).

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Refusing to meet and confer in good faith with Local 230 prior to adopting ballot measures involving changes to retirement benefits for current or prospective employees.

2. Interfering with Local 230's right to represent the members of its bargaining unit in employment relations with the City.

3. Interfering with the right of bargaining unit members to be represented by the employee organization of their own choosing.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

Rescind the City's March 6, 2012 approval of Resolution No. 76158, concerning changes to retirement benefits for the Police and Fire bargaining unit.

Dated: _____ CITY OF SAN JOSÉ

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 30 CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

EXHIBIT 2

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 21, AFL-CIO, Charging Party, v. CITY OF SAN JOSÉ, Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-996-M PROPOSED DECISION (11/5/2014)

Appearances: Wylie, McBride, Platten & Renner, by Christopher E. Platten, Diane Sidd-Champion, Attorneys, for International Federation Of Professional and Technical Engineers, Local 21, AFL-CIO; Renne Sloan Hotlzman Sakai LLP, by Charles D. Sakai and Steven P. Shaw, Attorneys, for City of San José.

Before Eric J. Cu, Administrative Law Judge.

In this case, an exclusive representative accuses a public agency of negotiating in bad faith over a proposed ballot measure to change employee retirement benefits. The agency denies any violation and maintains that it satisfied any existing bargaining obligations.

PROCEDURAL HISTORY

On August 31, 2012, International Federation of Professional and Technical Engineers, Local 21 (Local 21) filed an unfair practice charge with Public Employment Relations Board (PERB or Board), against the City of San José (City) alleging a violation of the Meyers-Milias-Brown Act (MMBA) and PERB Regulations.[1] On March 8, 2013, the PERB Office of the General Counsel issued a complaint alleging that the City negotiated in bad faith by approving

[1] The MMBA is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

a ballot measure that would change employees' retirement benefits prior to concluding good faith negotiations. On April 2, 2013, the City filed an answer to the complaint denying the substantive allegations and asserting that the ballot measure was only approved after completing any required bargaining. It also asserted multiple affirmative defenses, including the defense that its actions were justified by operational need and business necessity.

An informal settlement conference was scheduled for July 9, 2013. That meeting was cancelled at the request of Local 21 and over the City's objection. A formal hearing was scheduled for February 10-12, 2014. This case was consolidated for the formal hearing only with another case, SF-CE-969-M, involving similar claims against the City by International Association of Firefighters, Local 230 (Local 230). During the first day of hearing, the City, Local 230, and Local 21 agreed that the evidence submitted during the hearing would apply to both PERB case numbers SF-CE-969-M and SF-CE-996-M. The parties requested that PERB issue a separate decision for each case.

During the hearing, the City requested that PERB take official notice of a June 17, 2013 Order in Santa Clara Superior Court case number 1-12-CV-237635, involving the City and Local 230.[2] The assigned Administrative Law Judge (ALJ) admitted the Order as part of the record with the following caveat: "I don't think that the opinion reached by the Superior Court has any preclusive effect about the bargaining charges at issue here. However, if the parties want to argue otherwise, you're free to do so by referencing the [Order]."

[2] The Order concerned the City's petition for writ of mandate and petition to compel Local 230 to engage in interest arbitration in negotiations relating to the ballot measure. The court in that matter ordered the City and Local 230 to proceed to impasse arbitration pursuant to the City's Charter.

The parties filed simultaneous closing briefs on May 12, 2014. On July 25, 2014, the ALJ requested that the parties submit additional briefing over a claim raised in Local 21's brief that was not pled in the PERB complaint. The parties obliged and submitted those briefs on September 3, 2014. At that point, the record was closed and the case was considered submitted for decision.

FINDINGS OF FACT

The Parties

The City is a "public agency" within the meaning of MMBA section 3501(c) and PERB Regulation 32016(a). Local 21 is an "exclusive representative" within the meaning of PERB Regulation 32016(b). Local 21 represents multiple bargaining units at the City, including engineers and architects, management personnel, and maintenance supervisory personnel. This case concerns the parties' negotiations on behalf of all those units.

The City's Basic Governance Structure

The City's governing body is a Council of 11 publicly elected officials, including the Mayor and 10 Councilmembers. Chuck Reed was the Mayor during the incidents in this case The Council makes decisions on behalf of the City by majority vote during its weekly meetings, typically held on Tuesday evenings. The Mayor, individual Councilmembers, or other City officials may draft memos to the Council, who may adopt, modify, or reject the policies or recommendations in those memos. The City's fiscal year runs from July 1 until June 30.

The City's Pension System

The City has a defined benefit retirement plan, or pension system, for all its employees. The City's pension system is independent from other pension management agencies, such as

California Public Employees Retirement System (CalPERS). The pension system has two basic plans: (1) a plan for police officers and firefighters (Police and Fire Plan); and (2) a plan for all other City employees (Federated Plan). At the times relevant to this case, both were defined benefit plans. Each plan is managed by a separate board of decision-makers (the Pension Boards) who are not directly affiliated with the City, the City Council, or any City unions. The Pension Boards are responsible for determining the City's annual contributions for each plan, based on projections from its independent actuary. The Pension Boards' actuary conducts annual valuations, typically around the end of the calendar year. Those valuations include five-year projections about the total cost of the pension plans based on assumptions such as retirement age, the duration that retirees will continue receiving benefits, and investment returns. At all times relevant to this case, the Pension Boards used a company named Cheiron as its actuary. All Local 21 represented employees are eligible for the Federated Plan.

The Pension Boards administer benefits to the City's retirees. The City and its employees pay contributions to the appropriate pension plan. The bulk of the City's contributions are paid with money from its general fund.

The Police and Fire Plan

The key elements of the Police and Fire Plan include a benefit calculation of 3% of final compensation per year of service for every year over 20 years, and retirement eligibility at 55 years old with 20 years of service. The maximum pension benefit is 90 percent of final compensation. Final compensation is determined by the average base pay of the employee's highest 12 months of service. Benefits are also augmented by a guaranteed annual 3 percent Cost of Living Adjustment (COLA). Retirees may also receive Supplemental Retiree Benefit

Reserve (SRBR) payments, which are payments calculated from investment returns in excess of expected amounts. Employees are also eligible for retiree healthcare benefits.

The Federated Plan

The key elements of the Federated Plan include a benefit calculation of 2.5 percent of final compensation per year of service, retirement eligibility at 55 years or 30 years of service, and a maximum benefit of 75 percent of final compensation. As with the Police and Fire Plan, final compensation is determined by the average base pay of the employee's highest 12 months of service. The Federated Plan also includes guarantees of 3 percent COLA, SRBR, and retiree healthcare benefits.

The City's Employer-Employee Relations Resolution

City Resolution No. 39367 is its Employer-Employee Relations Resolution (EERR). It provides certain procedures for administering various aspects of personnel management. EERR section 2, includes definitions of various terms. Relevant to this case, EERR section 2(l) defines "Impasse" as "a deadlock in discussions between a majority representative and the City over any matters concerning which they are required to meet and confer in good faith[.]" EERR section 23 provides for impasse procedures, which "may be invoked by either party after a bona fide effort has been made to meet and confer in good faith and such efforts fail to result in agreement." That main procedure in section 23 is mediation. If mediation is unsuccessful, the parties may agree to other dispute resolution mechanisms. Nothing in the EERR requires the parties to meet the section 2(l) definition of "impasse" before invoking the section 23 procedures.

The City's Economic Downturn

The City was one of a number of public agencies in California experiencing economic stress over the past decade. The City asserts that it operated at a deficit from fiscal year 2003-2004 through 2011-2012, meaning its expenses outpaced revenue. During that same timeframe, the City records indicate that it reduced the number of budgeted employee positions from over 7,000 to under 6,000. In 2010, the City conducted an audit to analyze the sustainability of its two pension plans. The audit concluded that pension benefits have increased every year and were expected to continue increasing. Contributions to the pension system also grew during that timeframe but, according to the study, benefit payments consistently exceeded pension contributions since 2001. That trend continued even during years when the City cut staff or when the pension plans experienced investment losses.

The City auditor expressed concerns about the City's pension liability, including the fear that the City's pension contributions would constitute an increasing proportion of the City's budget. The City auditor suggested that this may force the City to reduce the level or quality of its services to pay its benefits costs. Another concern was the auditor's finding that pension benefit payments have outpaced both contributions and existing assets in the pension system, thereby creating a growing unfunded liability within the system.

These circumstances factored into the City's 2011 negotiations with its 11 bargaining units. Many units, including Local 21, agreed to a 10 percent reduction in base salary. Around the same time, on March 23, 2011, the parties reached a side letter agreement to bargain further over "pension and retiree healthcare benefits for current and future employees" upon request from either side. They further agreed that bargaining would commence within 10 days from the date of the request.

In April 2011, City Mayor Chuck Reed issued a press release about the effects of pension costs on the City's budget. Although not made specifically clear for the record, the press release apparently had a wide distribution, including a posting on the City's website. The press release mentioned the 10 percent negotiated concessions, but expressed the City's intent to seek additional savings via retirement reform and benefits changes. The press release also estimated that under an "optimistic scenario," the City's retirement costs would equal $400 million per year by 2015. The press release further stated that the director of the City's Retirement Services Department[3] said that costs could rise to $650 million per year during that same time period if certain assumptions, such as investment returns, are less favorable.

The Fiscal Reform Plan

On May 2, 2011, City Manager Debra Figone released a document entitled Fiscal Reform Plan. The Fiscal Reform Plan recommended changes to achieve City savings and, ultimately, to restore City services to the levels that existed in January 2011. Among the recommendations made in the report were using SRBR funds to pay for retirement benefits, creating a second tier of retirement benefits for new employees, changing the benefits for both current employees and retirees, and increasing employees' obligation to share in pension costs. The Fiscal Reform Plan estimated that the savings from its various retirement plan recommendations equaled around $216 million over five years. The Fiscal Reform Plan also estimated that pension costs could increase to $400.7 million by the 2015-2016 fiscal year if no changes were made.

[3] Unlike the Pension Boards, which operate independently from the City, the City's Retirement Services Department is a City department that oversees matters relating to the City's pension obligations.

The Mayor's May 13, 2011 Memo

On May 13, 2011, Mayor Reed, along with three other Council Members issued a memo to the City Council. The memo included a "RECOMMENDATION" section where the authors recommended declaring a fiscal emergency due to what they perceived as urgency for fiscal reforms "to avert a fiscal disaster, prevent substantial degradation of public safety and other vital city services, and maintain the integrity of our retirement system[.]" The authors also recommended approving the Fiscal Reform Plan, including all proposed retirement reforms. The core recommendations included sharing unfunded pension costs with employees equally and limiting employees' retirement benefits. The authors also proposed what would later be referred to as "Safety Net" provisions, which limited the City's expenses if City services ever fell below what existed on January 1, 2011.

The May 13, 2011 memo also included a "BACKGROUND" section, which described the City's financial condition from the authors' perspective. In that section, the authors repeated the assertion from the Fiscal Reform Plan that retirement costs could increase to $400 million by 2016. The memo also repeated the assertion from Mayor Reed's April 2011 press release that costs could rise to $650 million by 2016 under different, less-favorable assumptions. It is undisputed that no actuary ever supported the $650 million figure.

On May 24, 2011, the City Council adopted both the Fiscal Reform Plan and the May 13, 2011 memo. The City Council further "direct[ed] staff to proceed with steps necessary to implement the [Fiscal Reform Plan], including meeting and conferring with the bargaining units, as applicable."

The Parties' Communications Regarding Bargaining

On May 25, 2011, Local 21 President Nancy Ostrowski sent City Manager Debra Figone a letter stating that Local 21 was ready to enter into negotiations and that it would be bargaining on behalf of all its represented units.

On June 6, 2011, the City sent Local 21 a letter explaining its plan to propose a ballot measure concerning retirement reform issues consistent with the City Council's May 24, 2011 action. In the letter, the City expressed interest in commencing negotiations immediately. Local 21 representative Thomas Saggau could not recall whether Local 21 requested bargaining earlier than this date.

On June 7, 2011, the City Council delayed initial plans for a retirement reform ballot measure on its November 2011 ballot due to concerns from the City's bargaining units. The City Council also stated that it was under a "tight timeframe" and expressed interest in resolving any issues with the proposed reform prior to the start of the 2012-2013 fiscal year.

The Pledge of Cooperation

The parties discussed establishing a framework for their forthcoming retirement negotiations. It was understood that the City was interested in effectuating at least some aspects of its retirement reform plans through a local ballot measure to be voted on by City citizens. It was further understood that under state election law, the City Council must approve any ballot measure at least 88 days before the election. (See Elec. Code, § 9255(b).) At the time, the City targeted March 6, 2012, for the election.

On June 17, 2011, the parties entered into and signed a "Pledge of Cooperation," which outlined some basic concepts about the negotiations. Included in that document was that each party would use their own actuary to develop cost estimates. The parties also acknowledged

that the Pension Boards had their own actuary and that the Pension Boards' actuary would provide the official numbers used by the two pension plans.

The parties also agreed as follows:

> The parties agree to meet and confer in good faith and agree to complete the negotiation process by October 31, 2011. If the parties are unable to reach an agreement on retirement reform and/or related ballot measure(s) by October 31, 2011, the parties shall proceed to impasse, pursuant to procedures outlined in the [EERR section 23].

The Pledge of Cooperation also included the agreement that the City could exercise its constitutional authority to amend its charter through the ballot process at the conclusion of negotiations and mediation and that neither side was waiving any legal rights.

The City's Initial Proposal

On July 6, 2011, the City sent Local 21 a draft ballot measure language including most of the recommendations from the May 13, 2011 memo. Unlike the memo, however, the City's ballot language proposal did not reference the $650 million figure, or any other cost estimate for that matter.

The City proposed creating a less costly retirement program, called the Voluntary Election Program (VEP). As its name implies, employees' participation in the VEP would be voluntary. The key features of the VEP included a slower benefits accrual rate, a higher retirement eligibility age, and a longer years of service eligibility requirement for medical benefits. Employees that did not opt into the VEP would be responsible for 50 percent of the City's unfunded pension liability costs.

The City also proposed creating a new Tier 2 retirement plan for all new employees. Under Tier 2, the City's contributions to employee benefits would be between 6.2 and 9

percent and could not exceed 50 percent of the total cost of the new plan. The minimum retirement age would rise from 55 to 60 for employees previously eligible for the Police and Fire Plan, and from 60 to 65 for all other employees. The City also reserved the right to not use a defined benefit plan for the newly created Tier 2 retirement plan. If the City elected to use a defined benefit plan, benefits would accrue at a rate of 1.5 percent of final salary per year of service with a maximum COLA benefit of 1 percent per year, to be determined by the Consumer Price Index (CPI). An employee's final salary, for purposes of determining the benefit amount would be calculated based on the average of that employee's final three years of employment. Employees in the Tier 2 plan were eligible for retiree medical benefits after 20 years of service.

The City also proposed modifying both the existing Police and Fire Plan and the Federated Plan by reducing the future accrual rate for each plan to 1.5 percent of final salary per year of service, reducing COLA to a maximum of 1 percent, dictated by the CPI, and eliminating SRBR payments. It specified that any benefits earned and accrued in prior service would not be affected by the changes proposed. The City also proposed increasing employees' minimum retirement age by six months every year until the retirement age reached 60 for Police and Fire Plan employees and 65 for Federated Plan employees. It proposed a similar incremental increase for retiree medical benefits eligibility to a maximum eligibility of 20 years of service. Final salary, for determining benefit amounts, would be calculated based on the employee's final three years of employment. The City also proposed reducing existing retirees' COLA payments to a maximum of 1 percent per year, dictated by the CPI.

The City's proposal also included the "Safety Net" provisions described in the May 13, 2011 memo. Those provisions limited the City's ability to grant various types of compensation

increases or other employee benefits and rights if the City was unable to provide services at the levels that existing before January 1, 2011.

Cheiron's Mid-Cycle Valuation

On July 20, 2011, the Pension Plans' actuary, Cheiron, conducted a study of its plans, including a five-year cost projection. Cheiron predicted that pension costs for both plans combined would reach $431 million by 2016. The City Council received Cheiron's report in August 2011. Local 21 received the report on or around the same time.

The Parties' Pre-Mediation Negotiations

Ostrowski and Saggau served as Local 21's chief negotiators. Deputy Director of Employee Relations Gina Donnelly served as the City's chief negotiator. Director of Employee Relations Alex Gurza did not sit at the negotiating table with Local 21, but was involved the retirement reform negotiations for other bargaining units and was kept apprised of the progress in the Local 21 negotiations. The parties met 19 times before October 31, 2011, but did not reach an agreement. In that timeframe, the City made five proposals for a retirement reform charter amendment. These proposals were essentially identical to the proposals made to the City's other bargaining units. The following is a brief discussion of some of the more relevant events during those meetings.

The City's September 9, 2011 Proposal

On September 9, 2011, the City made a new proposal in the form of draft ballot measure language. Under the new proposal, employees that opted into the VEP would accrue benefits at a rate of 1.5 percent of final pay per year. COLA payments would cap at 1 percent, tied to the CPI. Final pay would be calculated using the average salary of an employee's three highest consecutive years.

The City also modified its proposal regarding employees who did not opt into the VEP. It dropped its proposal to modify the benefits accrual rate for those employees. It also proposed that employees share the City's unfunded pension liability costs by decreasing employees' salary by 5 percent each year until it reached an amount equal to 50 percent of the City's costs. The reductions could not exceed 25 percent of employees' pensionable income.

The City also proposed suspending COLA and SRBR payments to retirees if the City's unfunded liability costs rose above what existed on June 30, 2010. COLA payments could only be restored by either voter approval or a return to 2010 funding levels for three consecutive years.

Local 21's September 2011 Proposal

On or around September 27, 2011, Local 21 made a proposal that it asserted would save the City $153.8 million over five years. Local 21 proposed creating a Tier 2 benefits level that existing employees may opt into voluntarily. Employees under Tier 2 would have their benefits accrual rate reduced from 2.5 percent of salary per year of service to 2 percent. Under Tier 2, the retirement age for existing employees (currently age 55) would rise six months each year until it reached age 60. Instead of calculating final salary for retirement purposes using an employee's highest paid 12 months, Tier 2 employees' final salary would be based on the average of employees' highest 36 months. Tier 2 employees' COLA payments would also be reduced from 3 percent guaranteed per year, to a maximum of 2 percent, dictated by CPI. Tier 2 employees would not be eligible for SRBR payments.

Local 21 proposed a Tier 3 level solely for new employees. The proposed Tier 3 had a similar benefits structure as Tier 2, including the same benefits accrual rate, final salary

calculation formula, and COLA payment. The retirement age for Tier 3 employees would be 60 upon implementation of the new plan.

Although not specified clearly for the record, it appears as though Local 21's Tier 1 would be the current Federated Plan, at status quo. Local 21 suggested that the City could incentivize opting into the Tier 2 level by providing a signing bonus, salary increase, protection from layoffs, or other benefits.

The City's Request for Impasse Mediation

Additional meetings and proposals by the City did not yield an agreement before the October 31, 2011 deadline referenced in the Pledge of Cooperation. On October 31, 2011, the City sent Local 21 a letter about participating in mediation pursuant to the Pledge of Cooperation. The City did not expressly indicate that the parties were deadlocked or that it believed that there could be no further progress made in negotiations.

The November 2011 Mediation Sessions and Post-Mediation Developments

The parties participated in two mediation sessions on November 3, 8, 14, and 17, 2011 facilitated by State Mediation and Conciliation Services (SMCS). At hearing, the parties agreed that the discussions in mediation, aside from proposals made, would not be admitted into the record. Neither party made a proposal during the mediation sessions.

The City's November 22, 2011 Draft Charter Amendment

On November 22, 2011, the City sent Local 21 a letter stating that because there was no agreement in mediation, the City would be transmitting its proposed ballot measure on retirement reform to the City Council for adoption and placement on the City's March 6, 2012 ballot. It attached a version of the ballot measure not previously submitted to Local 21 and not discussed either in negotiations or in mediation. Although not clear from the face of either the

letter or the draft language itself, Local 21 witness Saggau acknowledged during the hearing that he considered the November 22, 2011 draft to be a proposal.

The new draft contained some key changes from earlier versions. Those changes included increasing the benefits accrual rate for those who opted into the VEP from 1.5 percent to 2 percent of final compensation per year of service, increasing the COLA payment from a maximum of 1 percent to 1.5 percent per year, based on CPI. It also decreased the retirement age to 57 for Police and Fire employees and 62 for all others. The new version continued to include a suspension of COLA payments to retirees, but included less stringent criteria for restoring payments. Significantly, the City also eliminated its previously proposed Safety Net provisions entirely. The City's negotiators described this new version as having "very significant changes" from earlier versions. City Manager Figone similarly described the new version as "far different from earlier versions" in an e-mail to City employees about the City's retirement negotiations. There is no evidence that Local 21 responded to this proposal.

The Recommendation to Delay the Election

On December 1, 2011, Figone issued a memo recommending that the City Council delay consideration of declaring a fiscal and service level emergency. In the memo, Figone reported that the Pension Boards' actuary, Cheiron, produced a preliminary valuation with new and more favorable projections from its earlier July 2011 valuation. Cheiron's new valuation projected that the City's 2012-2013 pension contribution costs would be around $55 million less than previously predicted. Mayor Reed and four Council Members made a similar recommendation in a separate memo. Mayor Reed also recommended moving the proposed election date for the ballot measure from March 6, 2012, to June 5, 2012.

The December 5, 2011 Draft Charter Amendment

On December 5, 2011, the City produced another version of its draft ballot measure. In that version, the City abandoned its plan to suspend retiree COLA payments until 2018. Instead, the City would have discretionary authority to suspend COLA payments for up to five years if the City declared a fiscal and service level emergency.

Local 21's December 5, 2011 Letter

On December 5, 2011, Ostrowski sent a letter to the City stating that "we are certainly interested in continuing mediation as was written in the editorial pages of the Mercury news today." She also stated Local 21 supported certain Councilmembers' recommendation to delay any official action on a proposed ballot measure, but that Local 21 was willing to work with the City in negotiating pension reforms sufficiently in advance of June 2012. Ostrowski accordingly stated that Local 21 would waive its right to request factfinding under AB 646[4] in order to continue negotiations and work towards agreement.

The City Council's Approval of Resolution No. 76087

On December 6, 2011, the City Council approved Resolution No. 76087, which ordered a June 5, 2012 City-wide election over the charter amendments proposed in the City's December 5, 2011 draft. At the same meeting, the City Council also deferred consideration of the earlier recommendation to declare a fiscal and service level emergency. The City never

[4] AB 646 amended the MMBA to allow an exclusive representative to request that a neutral factfinding panel examine the parties' differences in negotiations within 30 days from the end of impasse mediation. (Assem. Bill No. 646 (2011-2012), § 2.) That amendment became effective on January 1, 2012. The factfinding provisions of the MMBA were subsequently amended again to allow exclusive representatives the right to request factfinding even in cases were the parties did not participate in impasse mediation. (Assem. Bill 1606, (2011-2012), § 1.) That subsequent amendment was considered to be technical and clarifying of existing law. (*Id.*, at § 2.)

declared a fiscal and/or service level emergency at any time relevant to this case. At that point, the parties' negotiating teams had not discussed the City's November 22 proposal or its December 5 draft charter amendments.

The City Council directed City staff to delay transmitting the draft charter amendments to the City registrar "to allow time for continued mediation, if requested by the bargaining units." The effect of this directive was that registrar would not immediately finalize the election materials for the June 5, 2012 election. However, it was understood that the election would proceed over the City's proposed charter amendments unless it rescinded Resolution No. 76087. In order to satisfy state election law, the City had to finalize charter amendments by March 9, 2012, to qualify for the June 5, 2012 ballot. (See Elec. Code, § 9255(b).)

The City's Invitation for Further Mediation

On December 7, 2011, the City sent Local 21 a letter inviting it to re-engage in mediation using the framework described in Ostrowski's December 5, 2011 letter. The City also mentioned the need to submit the proposed charter amendments in Resolution No. 76087 to the registrar no later than March 9, 2012. The parties met with a mediator six additional times between January 6 and February 8, 2012.

The City's February 8, 2012 Proposal

On February 8, 2012, the City presented Local 21 with a new proposal. It did not identify the proposal as its last, best, and final offer or otherwise indicate that it would not make any additional proposals afterwards. The City proposed increasing the accrual rate for any defined benefit plan for new employees from 1.5 percent to 2 percent of salary per service year. It also increased COLA benefits for new employees from a maximum of 1 percent to 1.5 percent, depending on CPI.

For current employees that did not opt into the VEP, the City continued proposing reducing compensation to account for the City's unfunded pension liability. The City improved its proposal to reduce the salary of employees electing not to opt into the VEP. Instead of reducing salaries by 5 percent of pensionable income per year to a maximum of 25 percent, the City proposed a decrease of 4 percent per year to a maximum of 16 percent of income. As with prior proposals, the reductions would not exceed 50 percent of the City's unfunded pension liability.

Local 21 negotiator, Saggau, described the City's proposal in the following manner:

> As it I recall, you can have what the Council passed or adopted on December 6, 2011 or [the February 8 2012] subsequent revision. And we chose neither of them and rejected both. We felt as if, you know, it was here's rope to hang yourself, or here's a gun to shoot yourself, and we didn't feel like doing either one. So we said no to both.

Saggau later indicated that he believed that the City would proceed with Resolution No. 76087 because Local 21 rejected the February 8, 2012 version.

On February 21, 2012, the City sent Local 21 a letter confirming that no agreement was reached in mediation. It stated that the City Council would vote on replacing Resolution No. 76087 with the City's February 8, 2012 draft charter amendments. That day, City Manager Figone issued a memo to the City Council recommending repeal of Resolution No 76087 and adoption of a new resolution consistent with the City's February 8, 2012 draft.

On February 28, 2012, Local 21 demanded bargaining over the City's new draft ballot language. According to Local 21's demand, there were "significant restrictions" placed on Local 21's acceptance of the February 8, 2012 draft language in mediation.

Local 21's March 2, 2012 Proposal

On Friday, March 2, 2012, Local 21 submitted a new proposal using the same basic three-tiered structure. Employees who elected to stay in Tier 1 would maintain the status quo for retirement benefits, but would no longer receive any SRBR payments. Tier 1 employees would also have up to a 2.5 percent salary reduction for three years. Employees in Tier 2 would have a benefits accrual rate of 2 percent per year of service, a maximum retirement age of 60 years old, a 1.5 percent maximum COLA payment, depending on CPI, and no SRBR payments. Employees in Tier 3 would have a benefits accrual rate of 2 percent per year of service, a retirement age of 65 with at least 10 years of service, a 1.5 percent maximum COLA payment, depending on CPI, and no SRBR payments. Local 21 also proposed that Tier 3 employees pay 60 percent of the normal cost of benefits. On Saturday, March 3, 2012, Local 21 proposed meeting to discuss its new proposal.

On Monday, March 5, 2012, the City responded to Local 21 by letter. In the letter, the City stated that Local 21's proposed 7.5 percent salary reduction for Tier 1 employees was not a sufficient reduction to achieve the City's desired savings. The City also rejected Local 21's Tier 3 proposal for similar reasons, arguing that new employees should be paying more towards the benefits they will receive.

The City declined Local 21's requests for further meetings stating that Local 21 had already seen the version of the charter amendment being considered by the City Council the next day and that there were no "restrictions" placed on accepting those terms. The City also expressed concern about the timing of Local 21's request.

The City Council's Approval of Resolution No. 76158

On March 6, 2012, the City Council voted to approve Resolution No. 76158. That resolution repealed Resolution No. 76087, and approved a City-wide election on June 5, 2012, concerning the proposed City's February 21, 2012 charter amendments. That matter became known on the City's ballot as Measure B. Measure B passed among the local electorate by a vote of roughly 70 percent to 30 percent.

ISSUES

I. Should PERB consider Local 21's previously unalleged claims? If so, did the City violate the duty to meet and confer in good faith?

II. Did the City violate the duty to meet and confer in good faith by approving Resolution No. 76158?

CONCLUSIONS OF LAW

I. Local 21's Unalleged Violations

Local 21 requests that PERB consider two claims not expressly referenced in the PERB complaint. First, Local 21 asserts that the City's references to the $650 million pension cost estimate violated MMBA section 3506.5(c), which makes it unlawful to knowingly provide Local 21 with inaccurate information regarding its financial resources. Second, Local 21 argues that the City violated the duty to meet and confer in good faith by approving Resolution No. 76087 on December 6, 2011 prior to completing negotiations.

PERB has limited capacity to consider claims not described in the parties' pleadings. PERB may only consider such "unalleged violations" when the following criteria are met:

> (1) adequate notice and opportunity to defend has been provided the respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of

> conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on the issue.

(*Lake Elsinore Unified School District* (2012) PERB Decision No. 2241, p. 8 (*Lake Elsinore USD*), citing *County of Riverside* (2010) PERB Decision No. 2097-M; *Fresno County Superior Court* (2008) PERB Decision No. 1942-C; *Tahoe-Truckee Unified School District* (1988) PERB Decision No. 668.) The unalleged violation must also have occurred within the applicable statute of limitations period. (*Lake Elsinore USD*, *supra*, at p. 9, citing *Fresno County Superior Court.*) PERB must articulate its rationale for considering an unalleged violation. (*County of Riverside* (2006) PERB Decision No. 1825-M, p. 10.)[5]

In this case, Local 21 has not established that either of its unalleged claims are timely. Claims under the MMBA have a six month statute of limitations period. (*Coachella Valley Mosquito & Vector Control Dist. v. PERB* (2005) 35 Cal.4th 1072 (*Coachella Valley MVCD*), p. 1077.) In *Saddleback Valley Unified School District* (1985) PERB Decision No. 558, the Board stated that the six month statute of limitations is "computed by excluding the day the alleged misconduct took place and including the last day, unless the last day is a holiday, and then it also is excluded." (*Id.* at p. 3.) In that case, the Board found that the statute of limitations period for an alleged unilateral change occurring on June 20, 1984 began on June 21, 1984 and ended on December 20, 1984. (*Ibid.*)

PERB has described the statute of limitations both as an aspect of the charging party's burden and as an affirmative defense that the respondent has the burden to prove. (*South*

[5] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, p. 616; *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, p. 13, fn. 4.)

Placer Fire Protection District (2008) PERB Decision No. 1944-M, warning letter, pp. 2-3.)

In *Los Angeles Unified School District* (2014) PERB Decision No. 2359, the Board elaborated on this issue, stating:

> Charging party's duty to provide the [PERB] Office of the General Counsel with sufficient facts upon which to make a determination of timeliness is a bedrock principle. We do not disturb that principle here. We hold that the charging party's duty to establish timeliness has been discharged at the point at which the Office of the General Counsel has determined that the charge is not subject to dismissal for lack of timeliness and issues a complaint. Where the matter goes to a formal hearing, the presentation of evidence and allocation of burdens flow from the operative pleadings, the complaint and the answer. At this stage of the proceedings, we see no justification for treating the statute of limitations as anything but a "true" affirmative defense, which the respondent has the burden to plead and prove.

(*Id.* at p. 3.) Put another way, the charging party has the burden to demonstrate the timeliness of its claims during the PERB Office of the General Counsel's investigation of that charge. If a complaint issues on those claims, then the respondent has the burden to prove untimeliness at hearing.

In this case, PERB's Office of the General Counsel never concluded that Local 21's unalleged claims were timely. It furthermore never issued a complaint on Local 21's behalf regarding the unalleged allegations. For that reason the burden of proving timeliness regarding these claims did not shift to the City and Local 21 retains the burden to establish timeliness by a preponderance of the evidence. (PERB Regulation 32178.)

Local 21 alleges that the City violated the prohibition against providing inaccurate financial information contained in MMBA section 3506.5(c), which makes it unlawful for an employer to knowingly provide a union with inaccurate information about its financial resources. Local 21 asserts that the City's estimate that its pension costs could rise to $650

million by 2016 under certain assumptions violates MMBA section 3506.5(c). However, the record remains unclear about when the City communicated that figure to Local 21. Mayor Reed referred to the $650 million estimate in a memo dated May 13, 2011. The record shows that the City provided a copy of that memo to Local 21 as late as July 6, 2011.[6] Using this as the operative date for this claim, the statute of limitations began on July 7, 2011, and extended until January 6, 2012. Local 21 did not file its unfair practice charge referencing the $650 million figure until August 31, 2012, a point outside the statute of limitations for this claim. Accordingly, Local 21 has not demonstrated that this claim is timely. (See *SEIU-United Healthcare Workers West (Scholink)* (2011) PERB Decision No. 2172-M, warning letter, pp. 2-3.) It is not appropriate to consider this unalleged violation. (See *County of Orange* (2013) PERB Decision No. 2350-M, proposed decision, p. 16, fn. 8.)

The same conclusion is reached regarding its claims regarding the December 6, 2011 approval of Resolution No. 76087. The statute of limitations for this claim runs from December 7, 2011, only until June 6, 2012. Again, Local 21 referenced this claim in its unfair practice charge, but the charge was not filed until after the statute of limitations for this claim already expired. (See *SEIU-United Healthcare Workers West (Scholink)*, *supra*, PERB

[6] There was evidence that Local 230 heard Mayor Reed mention the $650 million figure on a local news program on February 24, 2012, but Local 21 did not establish that anyone from its own union heard that program. In addition, Local 21 has not met its burden of proving whether Mayor Reed was "providing" any information from the news program to Local 21 within the meaning of MMBA section 3506.5(c). Local 21 negotiator, Saggau, also testified that the City mentioned the $650 million figure frequently during bargaining but he never identified any specific dates where that number was referenced. Notes from the parties' bargaining sessions do not indicate that the figure was discussed in bargaining or even that Saggau attended any pre-mediation bargaining sessions. City witness Aracely Rodriguez testified to the accuracy of those bargaining notes. Thus, Local 21 has not met its burden of proving that the City provided the $650 million estimate to Local 21 any time after July 6, 2011.

Decision No. 2172-M, warning letter, pp. 2-3.) Accordingly, it is not appropriate to consider either of Local 21's unalleged violations. (See *County of Orange* (2013) PERB Decision No. 2350-M, proposed decision, p. 16, fn. 8.)

Neither of Local 21's unalleged violations are timely. Both are therefore dismissed.

II. The City Council's Approval of Resolution No. 76158

The PERB complaint alleges that the City approved the proposed charter amendment in Resolution No. 76158 before negotiations reached a bona fide impasse. The Board has held that "a bona fide impasse exists only if the employer's conduct is free from unfair labor practices; its right to impose terms and conditions at impasse is therefore dependent on prior good-faith negotiations *from their inception through exhaustion of statutory or other applicable impasse resolution procedures*." (*City of San Jose* (2013) PERB Decision No. 2341-M, pp. 39-40 [emphasis in original], citing *Temple City Unified School District* (1990) PERB Decision No. 841 (*Temple City USD*).) Enacting unilateral policy changes prior to reaching either agreement or genuine impasse in negotiations over those policies violates the duty to meet and confer in good faith. (*County of Riverside* (2014) PERB Decision No. 2360-M, p. 11.) Accordingly, this proposed decision will examine the parties' bargaining conduct to determine whether they ever reached a good faith impasse.

A. The Duty to Meet and Confer Over Proposed Charter Amendments

Local 21's bargaining claim beckons the question of what bargaining obligations a charter city has when seeking to change negotiable subjects via a charter amendment ballot measure. Both parties recognize that *People ex rel. Seal Beach Police Officers Association v. City of Seal Beach* (1984) 36 Cal.3d 591 (*City of Seal Beach*) is controlling on this issue. That case involved a city council's approval of three proposed charter amendments for its local

ballot relating to the treatment of employees who participated in a labor strike. The parties in that case agreed that all three charter amendments involved "terms and conditions of employment" within the meaning of MMBA section 3504. (*Id.* at p. 595, fn. 2) The court rejected the defendant city's argument that the "meet and confer" requirements in MMBA section 3505 conflicted with a charter city's authority under California Constitution, Article XI, section 3(b), to propose charter amendments to its local electorate. It instead found that:

> No such conflict exists between the city council's power to propose charter amendments and *section* 3505. Although that section encourages binding agreements resulting from the parties' bargaining, the governing body of the agency – here the city council – retains the ultimate power to refuse an agreement and to make its own decision. [citation and footnote omitted] This power preserves the council's rights under article XI, *section* 3, *subdivision* (b) – it may still propose a charter amendment if the meet-and-confer process does not persuade it otherwise.
>
> We therefore conclude that the meet-and-confer requirement of *section* 3505 is compatible with the city council's constitutional power to propose charter amendments.

(*Id.* at p. 601 (emphasis in original).) The court based its holding on the principle that "'general law prevails over local enactments of a chartered city, even in regard to matters which would otherwise be deemed to be strictly municipal affairs, where the subject matter of the general law is of statewide concern.'" (*Id.* at p. 600, quoting *Professional Firefighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, p. 292.) The court concluded uniform fair labor practices across the state, including the process by which labor disputes were resolved, was a matter of statewide concern. (*City of Seal Beach* at p. 600.)

MMBA section 3505 defines "meet and confer in good faith" as "the mutual obligation [to] personally meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals and

to endeavor to reach agreements on matters within the scope of representation[.]" Section 3505 further requires the parties to reserve "*adequate time for the resolution of impasses* where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent." (Emphasis supplied.) The California Supreme Court has previously interpreted section 3505 as precluding unilateral action from the employer until it has bargained with an exclusive or recognized bargaining representative until agreement or impasse. (*Coachella Valley MVCD, supra*, 35 Cal.4th 1072, p. 1083, citing *Santa Clara County Counsel Attorneys Assn. v. Woodside* (1994) 7 Cal.4th 525, p 537; see also *San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, p. 670.) Changes to terms and conditions of employment "prior to reaching an impasse in negotiations or completion of statutory impasse resolution procedures are a "per se" violation of the duty to bargain in good faith. (*County of Sonoma* (2010) PERB Decision No. 2100-M, p. 12, citing *Rowland Unified School District* (1994) PERB Decision No. 1053, *Pajaro Valley Unified School District* (1978) PERB Decision No. 51.) The duty to bargain until agreement or impasse applies equally to a public agency's duty to bargain over proposed charter amendments concerning negotiable matters. (*County of Santa Clara* (2010) PERB Decision No. 2120-M, pp. 13-14.)

The City does not dispute that it has some bargaining obligation here. It argues that it is only obligated to undergo a "special bargaining process" that does not include the need to reach impasse or to exhaust any impasse procedures. This position is inconsistent with MMBA section 3505, which expressly requires the parties to reserve time during bargaining process for impasse resolution procedures. Nothing in the *City of Seal Beach, supra*, 36 Cal.3d 591 decision sets aside the impasse language in MMBA section 3505 when bargaining over

proposed charter amendments. In fact, the court quoted section 3505 in its entirety, including the impasse provisions, as part of its rationale. (*Id.* at pp. 595-596, fn. 4.) In addition, the Board previously considered and rejected a similar argument in a case involving a proposed charter amendment for a prevailing wage measure. (*County of Santa Clara, supra*, PERB Decision No. 2120-M, p. 13.) There, the Board found that the requirements of MMBA section 3505 are only "satisfied if the parties either reach agreement or bargain to impasse and participate in any applicable impasse procedures." (*Ibid.*) Moreover, as the City admits in its post-hearing briefs, PERB has long found that participating in statutory impasse procedures is a "continuation of the bargaining process with the aid of neutral third parties." (*Modesto City Schools* (1983) PERB Decision No. 291, p. 36 [revd. on other grounds in *Compton Unified School District* (1987) PERB Order No. IR-50]; *County of Contra Costa* (2014) PERB Order No. Ad-410-M, p. 46; *Regents of the University of California* (1985) PERB Decision No. 520-H, p. 23.)

The City contends that the court in *City of Seal Beach, supra*, 36 Cal.3d 591, implied that there should be limits when bargaining over charter amendments because the court found that a city's meet and confer obligations should only create a "minimal" burden on that city's authority to amend its charter. (*Id.* at p. 599.) Placed in its proper context, the quoted language does not support the City's position. In that part of the decision, the court was addressing the defendant's argument that the MMBA's bargaining obligations violate California Constitution Article XI, section 3(b). In rejecting that argument, the court compared the matter to *District Election of Supervisors. Committee for 5% v. O'Connor* (1978) 78 Cal.App.3d 261, p. 267 (*O'Connor*), where local charter election procedures were invalidated

because they conflicted with statewide election law.[7] The court in *City of Seal Beach* found the meet and confer requirements in MMBA section 3505 to be "minimal" in comparison to *O'Connor*, because a city's bargaining obligations do not directly conflict with any city rule. (*Id.* at p. 599.) At no point, did the court expressly or impliedly conclude that cities are exempt from aspects of MMBA section 3505 when bargaining over proposed ballot measures.

The City finds further support for its position in the court's statement that a city "may still propose a charter amendment if the meet-and-confer process does not persuade it otherwise." (*City of Seal Beach*, *supra*, 36 Cal.3d 591, at p. 601.) Again, nothing in the quoted portion of the decision states or implies that the court intended to excuse cities from the impasse provisions of MMBA section 3505. Furthermore, the City's argument is unsound because participating in impasse procedures does not preclude a city from proposing charter amendments. As the court in *City of Seal Beach*, said, a city may propose such amendments unless it is persuaded to change course after participating in all of the meet and confer requirements under MMBA section 3505.

The City further asserts that negotiations of a City's proposed charter amendment are unique because at the end of negotiations, the City does not impose terms on affected bargaining units; it merely presents the proposed amendment to voters. However, there was no showing that this distinction requires a different approach to the meet and confer requirements in the MMBA. Nothing in the *City of Seal Beach*, *supra*, 36 Cal.3d 591 decision specifies that

[7] *O'Connor*, *supra*, 78 Cal.App.3d 261, concerned a conflict between a city's local charter provision, which required signatures from 5 percent of voters to qualify a charter initiative for the ballot and a section of the Government Code, which required 10 percent. (*Id.* at pp. 264-265.) The court in that case resolved the conflict in favor of the Government Code, after concluding that uniformity in the charter amendment process was a matter of statewide concern and that the legislative enactments superseded the city's charter. (*Id.* at p. 267.)

the parties' bargaining obligations should be treated differently in these cases. This argument is therefore unpersuasive.

The City also argues that complying with the impasse processes is impracticable because charter cities typically only create one charter amendment that will apply to multiple bargaining units. This position is unpersuasive for at least three reasons based on the record presented here. First, the City did not establish the need behind its decision to have only a single charter amendment for all of its 11 bargaining units. Nor was there evidence about the impracticability of having separate amendments for its various bargaining units or, at least, its two pension plans. The City should not be allowed to evade aspects of its bargaining obligations solely by the manner in which it crafts its charter amendment proposals.

Second, the exact situation described by the City actually arose in the *City of Seal Beach*, *supra*, 36 Cal.3d 591 case. The proposed charter amendments in that case applied to "any city employee who participated in a strike," (*Id.* at p. 595), but the court saw no reason to exempt the defendant city from bargaining with the plaintiffs, as required by MMBA section 3505.

Third, the facts in this case appear to show the City's bargaining obligation to multiple bargaining units actually facilitated discussions about the proposed charter amendment in this case. The record shows that the City's units formed coalitions during bargaining with Local 230 and the POA sitting together at one table and Local 21 negotiated on behalf of three City bargaining units. In fact, City Director of Employee Relations Gurza testified that the City was able to use proposals developed in one set of negotiations during its negotiations with other unions. PERB has previously found coordinated bargaining among unions to be lawful.

(*Compton Community College District* (1989) PERB Decision No. 728 (*Compton CCD*), proposed decision, pp. 62-63.) For all these reasons, the City's argument is rejected.[8]

Finally, the City asserts that it should not be required to bargain to and through impasse due to the strict statutory timelines required for qualifying a proposed charter amendment for an election. While it is conceivable that there might be some circumstances where a charter city may need to act on a charter amendment proposal within short period of time to capitalize on voter sentiment or some other kind of political tide, those circumstances must be proven with facts in the record. Facts supporting this argument were not presented here. Although measures must be placed on the ballot at least 88 days before the election, the City retained complete discretion over the election date it chose. There was no evidence that anything other than City's own preferences prevented it from selecting an election date far enough into the future in order to its bargaining obligations under MMBA section 3505. (See *Lucia Mar Unified School District* (2001) PERB Decision No. 1440, proposed decision, p. 47 [holding that self-imposed deadlines for making a final decision on negotiable subjects does not excuse a respondent's bargaining obligations].) The City's argument is accordingly rejected.

City of Seal Beach, *supra*, 36 Cal.3d 591 requires a charter City to satisfy its duty to meet and confer in good faith with affected unions before proposing the charter amendments

[8] The City also argues that subjecting charter amendment negotiations to the City's own local impasse procedures impermissibly conflicts with existing state statutory schemes covering charter amendments. Setting aside the fact that the City never identifies which State statutes conflict with its local impasse rules, it is in any event true that nothing in the impasse procedures in either the MMBA or the City's EERR requires the City to reach agreement with any union or change its stance over any charter amendment. Just as the court in *City of Seal Beach*, *supra*, 36 Cal.3d 591 concluded that the bargaining obligations under the MMBA do not conflict with a city's authority to propose charter amendments, it is also true that the City may exercise its authority to amend its charter after completing the EERR impasse procedures in good faith.

concerning issues within the scope of representation. (See *Id.*, at p. 602.) The meet and confer requirements under MMBA section 3505 includes allowing for adequate time to resolve impasses. The City was therefore required to fulfill all the bargaining obligations under MMBA section 3505 prior to proposing charter amendments concerning negotiable subjects in a local election.

B. Conduct From Outside the Statute of Limitations Period

As explained above, claims arising under the MMBA have a six month statute of limitations period. (*Coachella Valley MVCD, supra*, 35 Cal.4th 1072, p. 1077.) Allegations of misconduct from outside the statute of limitations period are typically subject to dismissal for untimeliness. (*Housing Authority of the City of Los Angeles* (2011) PERB Decision No. 2166-M, p. 3.) However, the Board has held that untimely conduct may be considered as "background evidence" for claims that are timely. (*Garden Grove Unified School District* (2009) PERB Decision No. 2086, p. 4, fn. 3, citations omitted.) This holding is consistent with the U.S. Supreme Court's treatment of a similar issue under the National Labor Relations Act. In *Local Lodge No. 1424, International Association of Machinists v. NLRB* (1960) 362 U.S. 411 (*Bryan Manufacturing*),[9] the Court described two basic contexts in which evidence from outside the statute of limitations may arise.

> The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period[.]

(*Id.* at pp. 416-417.) However:

[9] *Bryan Manufacturing* refers to the name of the employer in that case.

> [...]where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice.

(*Ibid.*) The National Labor Relations Board (NLRB) has subsequently considered conduct from outside the statute of limitations period as background evidence in a variety of different bargaining situations. (See e.g., *Regency Service Carts, Inc.* (2005) 345 NLRB 671, p. 672, fn. 3; *Teamsters Local Union No. 122 (August A. Busch & Co.)* (2001) 334 NLRB 1190, p. 1251; *Sparks Nugget, Inc.* (1990) 298 NLRB 524, fn. 5, p. 550, affirmed in relevant part at *Sparks Nugget, Inc. v. NLRB* (9th Cir. 1992) 968 F.2d 991, p. 995; *Houston County Electric Cooperative* (1987) 285 NLRB 1213, p. 1222.)

In *Rio School District* (2008) PERB Decision No. 1986 (*Rio SD*), the Board similarly held that an employer's actions outside the statute of limitations period "may be considered to the extent it sheds light on the true character of the District's bargaining conduct within the limitations period." (*Id.* at p. 10, fn. 7, citing *Sparks Nugget, Inc. v. NLRB*, *supra*, 968 F.2d at p. 995, *Trustees of the California State University*, *supra*, PERB Decision No. 1970-H, proposed decision, p. 20; see also *Santa Monica Community College District* (2012) PERB Decision No. 2243, dismissal letter, p. 2.) In contrast, bargaining claims based solely upon conduct outside the statute of limitations period are not timely. (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2017-S, warning letter, p. 8.)

In the present case, Local 21 filed its charge on August 31, 2012, meaning all alleged misconduct by the City occurring prior to February 29, 2012, is outside the six month statute of limitations period. (*Saddleback Valley Unified School District*, *supra*, PERB Decision

No. 558, p. 3.) However, evidence from outside this period still provides important insight into the parties' more timely bargaining conduct. For that reason, the parties' older bargaining activity will be reviewed to the extent that it "sheds light" on whether the parties were at bona fide impasse when the City approved Resolution No. 76158. This approach is particularly warranted here because the negotiations in this case spanned almost nine months.

C. The City's Approval of Resolution No. 76087

Local 21 claims that the City unilaterally approved Resolution No. 76087 in December 2011 and that this demonstrates that the parties were not at impasse when the City subsequently approved Resolution No. 76158 in March 2012. The City maintains that the parties were at impasse in December 2011 and remained at impasse in March 2012.

1. Effect of the Pledge of Cooperation

In most cases, the duty to bargain requires that the parties refrain from unilateral action on negotiable matters until the parties reach either agreement or impasse, unless a party has waived its right to negotiate the over those matters. (*County of Santa Clara* (2010) PERB Decision No. 2114-M, p. 13, citing *Omnitrans* (2009) PERB Decision No. 2001-M.) In this case, the parties disagree about whether they reached impasse in negotiations on or around October 31, 2011. The City asserts that impasse was an "automatic" function of the Pledge of Cooperation, which states in relevant part:

> The parties agree to meet and confer in good faith and agree to complete the negotiation process by October 31, 2011. If the parties are unable to reach an agreement on retirement reform and/or related ballot measure(s) by October 31, 2011, the parties shall proceed to impasse, pursuant to procedures outlined in the [EERR section 23].

Local 21 contends that the parties never agreed that negotiations would be at impasse on October 31, 2011; they only agreed to utilize the impasse procedures contained in the EERR. EERR section 23 does not require that the parties meet the EERR definition of impasse before they resort to its impasse procedures. It only requires that "a bona fide effort has been made to meet and confer in good faith and such efforts fail to resort in agreement."

The MMBA has no strict timelines for completing the meet and confer process. Instead, MMBA section 3505 only requires that negotiations "continue for a reasonable period of time" and "include an adequate time for the resolution of impasses" through procedures that are either required or agreed upon by the parties. Neither party may avoid its bargaining obligations by unilaterally setting deadlines for completing negotiations. (*County of Riverside, supra*, PERB Decision No. 2360-M, p. 20, citations omitted.) On the other hand, the court in *Santa Clara County Correctional Peace Officers' Assn., Inc. v. County of Santa Clara* (2014) 224 Cal.App.4th 1016 (*County of Santa Clara/CPOA*) recently found that parties "are free to agree in advance on a period of time that they consider reasonable to allow them to freely exchange information and proposals and endeavor to reach agreement." (*Id.* at pp. 1038-1039, review den. July 9, 2014.) In that case, the parties entered into an agreement permitting the county to convert employees' existing schedules to either a 4/10 or a 5/8 schedule:

> upon the giving of forty-five (45) calendar days' advance notice of such change to the Association, which shall be afforded the opportunity to meet and confer on such a proposed change prior to implementation.

(*Id.* at p. 1024.) The court in that case rejected the county's argument that the agreement amounted to a clear and unmistakable waiver of the right to meet and confer over schedule changes. The court instead concluded that the above-quoted language constituted a binding

agreement to complete negotiations 45 days. The court further found that the 45-day period was not an "arbitrary deadline" for finishing bargaining under the facts of that case, apparently a prerequisite to making such an agreement binding. (*Id.* at p. 1039.)

Notably, the court in *County of Santa Clara/CPOA*, *supra*, 224 Cal.App.4th 1016 also interpreted the parties' agreement to cover all aspects of their meet and confer requirements. Thus, while the court believed that 45 days was a sufficient to complete for any pre-impasse bargaining, the court found it unreasonable to expect the parties to also complete county's local impasse procedures set forth in that county's local rules within that time period.[10] The court accordingly concluded that "[i]t therefore appears that the parties did not intend the impasse resolution procedure to apply to this particular proposal," finding instead that the parties agreed to "implementation of the County's proposal 45 days after providing notice, regardless of whether the parties reach agreement or impasse on implementation in the interim." (*Id.* at p. 1039.) In other words, the union under those facts "waive[d] any right to postpone implementation beyond 45 days by declaring impasse and compelling mediation." (*Ibid.*)[11]

PERB may review parties' contracts only to the extent necessary to decide issues within its jurisdiction, such as unfair practice charges. (*County of Sonoma* (2012) PERB Decision No. 2242-M, p. 15, citing *Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H, *County of Ventura* (2007) PERB Decision No. 1910-M.) When such

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[10] The impasse procedure in the county's local rules in *County of Santa Clara/CPOA*, *supra*, 224 Cal.App.4th 1016, provided for mandatory mediation, unless another procedure is agreed upon by the parties. (*Id.* at p. 1036.) The impasse mediation procedures in City EERR section 23, once invoked, do not allow the parties to agree to opt out of mediation.

[11] But see *Redwoods Community College District* (1996) PERB Decision No. 1141, proposed decision, pp. 12-15 [holding that parties subject to a different collective bargaining statute may not agree to opt out of statutorily required impasse procedures].)

review is warranted, PERB applies traditional principles of contract interpretation. Those principles include interpreting agreements in a manner that effectuates the parties' mutual intentions at the time of agreement and looking first to the plain language of the agreement when trying to determine its meaning. (*Id.*, citing Civ. Code, §§ 1636, 1638.) If the plain meaning of the contract language is clear and unambiguous, no further evidence is required to interpret the agreement. Furthermore, the language of the agreement must be read together as a whole. (*Id.* at pp. 15-16.)

In the present case, the parties agree that interpreting the Pledge of Cooperation is relevant to the status of the parties' negotiations at the end of 2011. The unambiguous language of the Pledge of Cooperation shows that the parties clearly intended to set parameters about the length of pre-mediation negotiations on retirement reform. According to the court in *County of Santa Clara/CPOA*, *supra*, 224 Cal.App.4th 1016, the parties were permitted to do so.[12] Local 21 argues that the reference to October 31 represented only a nonbinding "goal" to finish negotiations, but that interpretation cannot be squared with the plain language of the agreement. The statement that "[t]the parties agree to meet and confer and good faith and

[12] The court in *County of Santa Clara/CPOA*, *supra*, 224 Cal.App.4th 1016 notably did not reach the issue of whether the parties could stipulate beforehand when they will reach the legal status of "impasse" in negotiations. Nothing in the agreement in that case indicated anything about when they would reach "impasse." (*Id.* at p. 1024.) Likewise, in the present case, although the Pledge of Cooperation specifies that the parties shall proceed *to impasse*, i.e., to the impasse resolution procedures in City EERR section 23, nothing in the agreement dictates that the parties would be *at impasse*, i.e., at a deadlock in discussions regarding negotiable matters (EERR,§ 2(l)), by a certain date. Moreover, that question is inconsequential to the decision in this case because the parties may agree to complete bargaining within a reasonable fixed time period, irrespective of impasse. Therefore, although it is unlikely that well-settled concepts of collective bargaining would allow parties to agree in advance when negotiations will be deadlocked or otherwise at loggerheads, it is unnecessary to decide that issue in this proposed decision.

agree to complete the negotiations process by October 31, 2011" is not subject to multiple interpretations. Therefore, while it is not technically correct that the parties reached "impasse" on October 31, 2011, I find that the parties clearly agreed to complete pre-mediation bargaining by that date.[13]

I also find that, unlike the parties in *County of Santa Clara/CPOA*, *supra*, 224 Cal.App.4th 1016, the parties in this case did not intend to waive their right to use the impasse mediation process under EERR section 23. To the contrary, the parties plainly agreed to use that process if no agreement was reached before October 31, 2011. The Pledge of Cooperation did not specify a time for completing impasse procedures.

While extrinsic evidence is not required to understand how the parties intended the Pledge of Cooperation to operate, outside evidence does explain why the parties selected October 31, 2011, as the operative date. The agreement refers to, but does not detail, the City's interest in pursuing a ballot measure. Other documents and witness testimony show that the parties chose October due to statutorily mandated timelines for placing a proposed charter amendment on a local ballot. At the time of they signed the agreement, the City earmarked March 6, 2012, for the election, meaning the City Council had to approve the proposed

[13] The City suggests in briefing that the issue of whether the parties reached impasse via the Pledge of Cooperation was conclusively decided by the Santa Clara Superior Court in its June 17, 2013 order compelling Local 230 to engage in interest arbitration. However, Local 21 was not a party to that matter and the court reached no findings regarding Local 21. In addition, the court in that case correctly recognized that it lacked jurisdiction to decide whether the parties had completed negotiations in good faith and expressly declined to rule on that issue. PERB has exclusive initial jurisdiction to decide whether an employer covered by the MMBA failed to satisfy its meet and confer obligations under MMBA section 3505. (*San Diego Municipal Employees Assn. v. Superior Court* (2012) 206 Cal.App.4th 1447, p. 1457.) Thus, the court did not and could not determine whether the parties ever reached a bona fide impasse relieving them of any bargaining obligation.

amendments by December 9, 2011. The record shows that the parties selected October 31, 2011, to allow time for negotiations before December 9, 2011.

2. Reinstating the Duty to Bargain

Under normal circumstances, the duty to bargain in good faith is ongoing and continuous. (*County of Contra Costa*, *supra*, PERB Order No. Ad-410-M, pp. 23, 38, administrative determination, pp. 7-8, citing *Conley v. Gibson* (1957) 355 U.S. 41, p. 46; *NLRB v. Acme Indus. Co.* (1967) 385 U.S. 432, pp. 435-436.) Even impasse in negotiations is impermanent. As the court in *PERB v. Modesto City Schools District* (1982) 136 Cal.App.3d 881 observed, "impasse is a fragile state of affairs and may be broken by a change in circumstances that suggest that attempts to adjust differences may no longer be futile." (*Id.* at p. 899.) Once impasse is broken, the duty to bargain revives. (*Ibid.*; see also *Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231-M (*Stanislaus CFPD I*), p. 13, fn. 14.) The Board discussed the reasoning behind this policy in *Modesto City Schools*, *supra*, PERB Decision No. 291. That case involved the parties' duty to bargain after formal impasse procedures concluded under Educational Employment Relations Act (EERA). (*Id.* at p. 32.) The Board found the fundamental purpose behind the meet and confer requirement in the public sector is to encourage face-to-face meetings and ultimately bring about peaceful negotiated agreements. (*Modesto City Schools*, *supra*, PERB Decision No. 291 at pp. 34-35.) The Board cited in language from EERA support, stating that its purpose is "'to promote the improvement of personnel management and employer-employee relations[.]'" (*Id.* at p. 35, quoting Gov. Code, § 3540.)[14] In a similar way, the Board found that formal codified

[14] MMBA section 3500(a) and City EERR, section 1 both contain language nearly identical to the quoted portion of Government Code section 3540.

impasse procedures ensures that parties fully explore the possibility for concessions, compromises, and settlement before taking unilateral action such as imposition of terms, strikes, or lockouts. (*Id.* at pp. 36-37.) Thus, concluded the Board, reviving the duty to bargain in the face of "changed circumstances" was a necessary component of the duty to bargain in good faith. (*Id.* at p. 38, citing *Modesto City Schools District*, *supra*, 136 Cal.App.3d at p. 899.) The same principles apply in impasses occurring under the MMBA. (See *Stanislaus CFPD I*, *supra*, PERB Decision No. 2231-M, p. 13, fn. 14; see also *City & County of San Francisco* (2009) PERB Decision No. 2041-M, proposed decision, p. 27.)

In the present case, the parties entered into the EERR impasse mediation process pursuant to their agreement in the Pledge of Cooperation, not because the parties reached impasse. One issue presented in this case is whether the duty to bargain at the end of impasse procedures under these circumstances may "revive" in the same sense as it does had the parties actually bargained to impasse. There is good reason to view these two situations similarly. As the court found in *County of Santa Clara/CPOA*, *supra*, 224 Cal.App.4th 1016, parties may agree in advance on what constitutes a "reasonable period of time" for negotiations under MMBA section 3505. (*Id.* at pp. 1038-1039.) The parties in this case reached such an agreement, but nothing in the terms of that deal absolved the parties of the remainder of their bargaining obligations. Based on the unvarying precedent set in *Modesto City Schools District*, *supra*, 136 Cal.App.3d *881, Stanislaus CFPD I*, *supra*, PERB Decision No. 2231-M, *City & County of San Francisco*, *supra*, PERB Decision No. 2041-M, and *Modesto City Schools*, *supra*, PERB Decision No. 291, the parties remained obligated to fully explore the possibility for agreement in order to avoid the disruption of valuable public services that may occur at the conclusion of all bargaining. (*City & County of San Francisco*, *supra*, PERB

Decision No. 2041-M, proposed decision, p. 27; *Modesto City Schools*, *supra*, PERB Decision No. 291 at pp. 34-35.) A key component of that obligation is the duty to consider how new circumstances affect the possibility for agreement. (*Modesto City Schools* at p. 38, citing *Modesto City Schools District*, *supra*, 136 Cal.App.3d at p. 899.) The alternative, i.e., allowing parties who have agreed to a bargaining schedule in advance to ignore how new information or circumstances might lead to agreement, is at odds with the core purpose of collective bargaining. Moreover, as the facts in this case show, new circumstances may alter the purpose behind the parties' negotiations timetable. Therefore, I conclude that the parties' duty to bargain in good faith may revive in the face of changed circumstances even though they agreed on a time limit for pre-mediation negotiations.

The facts of this case illustrate the merit of this conclusion. It is undisputed that the purpose of the timelines in the Pledge of Cooperation was to allow for negotiations ahead of December 9, 2011, when the City planned on finalizing its ballot for a March 6, 2012 election. As will be discussed in greater detail below, circumstances at the City changed in December 2011, causing the City Manager, the Mayor, and a majority of the City Council to move the election from March 6 to June 5, 2012. As Gurza put it, "the urgency of the matter to go in March lessened, and that was part of the reason the Council was willing to agree to move [the proposed charter amendment] to the June election." Put another way, the purpose behind the timelines in the Pledge of Cooperation was undercut by subsequent events.

In addition, nothing in the Pledge of Cooperation indicated a waiver of the right to either participate in the impasse process fully or to waive the right to subsequent bargaining should circumstances change. To the contrary, the parties expressly declined to waive any legal rights when signing the agreement. The City's EERR does not even allow the parties to

circumvent impasse mediation, once invoked. Under these facts, it is unreasonable to allow the parties to ignore any new developments when evaluating their ongoing bargaining obligations. Therefore, the parties were obligated to consider how new events affected their ability to reach agreement.

3. The Existence of "Changed Circumstances" in This Case

The Board has defined "changed circumstances" as "those movements or conditions which have a significant impact on the bargaining equation." (*Modesto City Schools*, *supra*, PERB Decision No. 291, p. 35.) However, in *State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2102-S (*DPA*), PERB was reticent to conclude that the mere occurrence of supervening events is sufficient to revive the duty to bargain post-impasse. (*Id.* at proposed decision, pp. 8-9.) Rather, there must be "substantial evidence that a party is committed to a new bargaining position." (*Id.* at proposed decision, p. 8, citing *Serramonte Oldsmobile, Inc. v. NLRB* (D.C. Cir. 1996) 86 F.3d 227, p. 233.)

Most commonly, "changed circumstances" break impasse when significant bargaining concessions "'open a ray of hope with a real potentiality for agreement if explored in good faith in bargaining sessions.'" (*Modesto City Schools*, *supra*, PERB Decision No. 291, p. 39, quoting *NLRB v. Webb Furniture* (4th Cir. 1966) 366 F.2d 314, p. 316 (*Webb Furniture*); *Modesto City Schools District*, *supra*, 136 Cal.App.3d at p. 899; *City of Santa Rosa* (2013) PERB Decision No. 2308-M, p. 6, fn. 2.) If one party makes a concession during impasse, the other party must consider the new proposal in good faith. (*Modesto City Schools*, p. 39; see also *Saddleback Valley Unified School District* (2013) PERB Decision No. 2333, p. 11, proposed decision, pp. 14-15.) Even if the conceding party's proposal is not fully acceptable, the reviewing party must attempt to determine whether concessions made were significant

enough to relieve the impasse and reinstate the duty to bargain. (*Modesto City Schools*, p. 39.) On the other hand, "either party is free to conclude that it has made all the concessions it can and further negotiations are futile." (*Ibid.*) Thus, in *Modesto City Schools*, the Board found that an employer violated the duty to bargain in good faith after it failed to review a neutral factfinders' report with recommendations for resolving their impasse and also refused to meet with the union and consider newly proposed concessions. (*Id.* at p. 44.)[15] The proposed concessions in that case included acceding to the employer's position on the length of the agreement, minimum class sizes, and transfer policies, as well as other proposals recommended by the factfinding report. (*Id.* at pp. 39-40.) In contrast, in *Charter Oak Unified School District* (1991) PERB Decision No. 873, the Board held that an employer was not obligated to physically meet over the charging party's proposal to accept a factfinding panel's recommendations because the employer had already rejected those recommendations in a written dissent to the panel's report. (*Id.* at pp. 11-12.)

In this case, the parties completed pre-mediation bargaining around the end of October 2011. The parties then participated in four mediation sessions in November 2011, but concluded that process without making additional proposals or reaching agreement. After mediation ended, on November 22, 2011, the City made a significant new proposal which retreated from earlier positions on important issues. For example, the City's proposed changes to the benefits accrual rate in its VEP tier matched Local 21's own Tier 2 proposal. The City's proposals regarding COLA payments and the minimum retirement age also moved closer to Local 21's proposal. The City also withdrew entirely its "Safety Net" provisions, which could

[15] The Board also found that the employer's conduct violated the duty to participate in impasse procedures in good faith. (*Ibid.*)

have severely curtailed the City's ability to provide various types of discretionary salary increases and other employee benefits without voter approval. The City again revised its proposed charter amendment on December 1, 2011. The City never expressed any willingness to meet over either of these two drafts.

In addition, the Pension Plans' actuary, released new pension cost projections on or around December 1, 2011. Cheiron projected that the City's 2011-2012 pension costs would be around $55 million less than predicted earlier. Unlike in *DPA*, *supra*, PERB Decision No. 2102-S, the new valuation was not merely a new event with an uncertain impact on the parties' bargaining positions. The City admits that its bargaining position was based, in part, on its perceived urgency to put the issue before voters in March 2012. Yet, as Gurza later said, the "urgency of the matter to go in March lessened" after reviewing Cheiron's updated projections.

Then, on December 5, 2011, Local 21 expressed its hope that the City delay a Council vote on approving proposed charter amendments for the local ballot. Local 21 further expressed its interest in continuing negotiations and even stated that it was willing to waive its right to request factfinding or other measures that might interfere with the parties' ability to continue negotiations. The City did not respond to Local 21's letter or agree to meet with Local 21 at any time before the City Council approved the proposed charter amendment in Resolution No. 76087.

The City argues that the duty to bargain never revived because it was undisputed that Local 21 did not accept its post-mediation proposals. However, the duty to bargain in good faith may reactivate even by concessions that do not wholly resolve the issues in dispute. Rather, "[e]ven if not fully acceptable, a good faith effort must be made to determine if the

new proposals are significant enough to 'relieve the impasse and open a ray of hope with a real potentiality for agreement if explored in good faith bargaining sessions.'" (*Modesto City Schools, supra*, PERB Decision No. 291, p. 39, quoting *Webb Furniture, supra*, 366 F.2d 314.) During the hearing, the City admitted that its own proposal contained "significant changes" from its earlier position. Thus, even if it were true that its proposals did not completely resolve their disagreement, the parties nevertheless had the obligation to discuss the new proposals and other changes to explore whether there was some basis for progress in negotiations. Moreover, there is no evidence in the record that the City even waited to see whether Local 21 would agree to one of its proposals before it implemented Resolution No. 76087. At the very least, the duty to bargain obligated the City to ascertain whether its proposal was acceptable before taking unilateral action. (See *Kings In-Home Supportive Services Public Authority* (2009) PERB Decision No. 2009-M, p. 11.)

The duty to meet and confer in good faith under MMBA section 3505 obligated the parties in this case to explore whether the post-mediation events in 2011 provided some basis for believing "that attempts to adjust differences may no longer be futile." (*Modesto City Schools District, supra*, 136 Cal.App.3d at p. 899.) The evidence in this case shows that the City did not satisfy this obligation, despite Local 21's request.

4. The City Council's Approval of Resolution No. 76087

The City Council approved of Resolution No. 76087 during its December 6, 2011 City Council meeting. The City acknowledges this fact but argues that the parties had fully exhausted any bargaining obligation by that point because the parties remained unable to reach agreement despite lengthy negotiations. It contends that, after this process, it was privileged to impose its last, best, and final offer. The City admits that the terms approved in Resolution

No. 76087 were based on its December 5, 2011 draft, not its November 22, 2011 proposal. It further admits that the parties never met or discussed the December 5 draft. The City argues that unilateral action was nevertheless justified because the terms imposed were reasonably comprehended within its November 22, 2011 proposal, what it now calls its last, best, and final offer.[16] This argument is unpersuasive because the undisputed evidence in the record shows that the parties also never bargained or otherwise discussed the City's November 22, 2011 proposal.

To the extent that the City defends its conduct by arguing that the terms of No. 76087 never took effect, that position was considered and rejected in *County of Sacramento* (2008) PERB Decision No. 1943-M. There, a county employer unilaterally changed the eligibility requirements for its retiree health care program. (*Id.* at pp. 7-8.) The employer later rescinded those changes prior to their effective date. (*Id.* at p. 9.) The Board dismissed the argument that the rescission defeated the union's unilateral change claim, holding instead that "[t]he fact that the County reversed its position and restored the status quo before the new policy went into effect, does not cure the unlawful unilateral change." (*Id.* at p. 12; see also *Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231a-M (*Stanislaus CFPD II*), p. 8.) The same result is required here. The City Council approved Resolution No. 76087 on December 6, 2011, before fully satisfying its duty to meet and confer in good faith. The fact that the City delayed action on that resolution and later repealed it is of no consequence. The parties stipulated that the proposed charter amendments from Resolution No. 76087 would have been placed on the City's June 5, 2011 ballot unless repealed by the City Council.

[16] It is noteworthy that the City never informed Local 21 that the November 22, 2011 proposal was its last, best, and final offer. In fact, it did not even label that draft as a proposal.

Equally unpersuasive is the claim that the City's willingness to continue bargaining after approving Resolution No. 76087 excused any violation. In *Anaheim Union High School District* (1982) PERB Decision No. 201 (*Anaheim UHSD*), the Board held that unilateral changes to employees' salaries and benefits were "official and legally effective" when the school employer's board approved those changes, not at some later effective date. (*Id.* at p. 11.) It accordingly rejected the argument that the unilaterally approved changes were merely the employer's "unofficial initial proposal." (*Ibid.*) According to the Board,

> Were we to characterize an employer's action unilaterally reducing salaries as an "initial bargaining proposal" simply because it had a deferred effective date we would be legitimizing a tactic patently offensive to the statutory requirement of good faith bargaining.

(*Id.*; see also *Stanislaus CFPD II*, *supra*, PERB Decision No. 2231a-M, p. 8.) Likewise, in this case, the fact that the parties continued meeting after the City approved Resolution No. 76087 does not nullify the harm caused by the City's unilateral action.

For all these reasons, I conclude that the City adopted Resolution No. 76087 prior to completing its bargaining obligations with Local 21. As explained above, evidence of this conduct cannot be used to establish an independent violation of the MMBA because Local 21 did not raise this as a claim within the applicable statute of limitations period. Accordingly, evidence of the City's unilateral approval of Resolution No. 76087 is only relevant to the extent that it provides insight into the parties' later bargaining and the City's approval of Resolution No. 76158.

D. Uncertainty Over the City's February 8, 2012 Proposal

After the events from 2011, the City's subsequent bargaining conduct further suggests that the parties never reached a bona fide impasse. There was substantial confusion over what

turned out to be the City's final proposal for a retirement reform ballot measure. The City never informed Local 21 that its February 8, 2012 proposal was its last, best, and final offer (LBFO). It is true that neither the MMBA, nor the City's EERR, require the parties to label a proposal as an LBFO.[17] In fact, PERB generally disfavors the "magic words" approach to bargaining. For example, in *Rio Hondo Community College District* (2013) PERB Decision No. 2313, the Board held that a party's bargaining demand need not be made in a specific form as long as it adequately signifies the desire to bargain over a negotiable subject. (*Id.* at pp. 4-5.) Likewise, in *Chula Vista City School District* (1990) PERB Decision No. 834, the Board found that a party need not "chant magic words" to inform the opposing party of its desire to cease negotiations over a non-mandatory subject of bargaining. (*Id.* at pp. 40-41.) Parties in negotiations are still required, however, to communicate their bargaining positions effectively and clearly. For instance, both of the above-cited cases turned on whether the union adequately explained its position in order to facilitate good faith discussions.

Conversely, a party's failure to explain its position in bargaining may indicate bad faith. In *Compton Community College District, supra*, PERB Decision No. 728, PERB found that an employer's failure to clarify confusing statements about its financial condition made it such that "meaningful negotiations [over employee salaries] were not possible." (*Id.* at proposed decision, p. 27.) PERB found that this contributed to the overall finding that the employer lacked the good faith intent to reach agreement. (*Id.* at pp. 60-61.) PERB reached this

[17] But see MMBA section 3505.7, which states that an employer may implement its last, best, and final offer after completing any required impasse resolution procedures. That section became effective on January 1, 2012. (Assem. Bill No. 646 (2011-2012), § 4.)

conclusion even in the absence of any evidence that the employer intentionally misled the union. (*Id.* at p. 28.)

In this case, regardless of whether the City was required to describe its February 8, 2012 proposal as its "LBFO," the City was obligated to clearly articulate its position in bargaining. There was no showing here that the City ever conveyed its position that negotiations were over and that it was making its final proposal. This omission left Local 21 unprepared for the fact that the City would refuse further meetings more than a month before final action on the ballot measure was required under statewide election law.

The City argues that any confusion over its proposal was inconsequential because Local 21 did not counter the City's offer until March 2, 2012. The timing of Local 21's proposal is not surprising, given the ambiguous way that negotiations ended. Local 21 was unaware that the City had reached its final position in bargaining and reasonably did not understand the urgency in developing a counterproposal sooner. Earlier in negotiations, the City continued making proposals up until four days before the City Council was scheduled to take action. Thus, there was no indication that there was any need for Local 21 to respond sooner.

In addition, Saggau explained that there was some confusion over the exact parameters of the City's offer. He testified that the City presented Local 21 with two options, the draft proposal already approved as part of Resolution No. 76087 or the revised draft, dated February 8, 2012. At the end of mediation, Saggau had the impression that, because no agreement was reached, the City would proceed with Resolution No. 76087. Then, on February 21, 2012, the City stated that it was replacing the draft charter amendment in Resolution No. 76087 with the February 8, 2012 version. The City gave no indication that it was willing to meet over this development. In *Kings In-Home Supportive Services Public Authority*, *supra*, PERB Decision

No. 2009-M, the Board found that an employer's failure to provide the union with the opportunity to timely respond to its LBFO before refusing to participate in further negotiations indicated an intent to subvert the negotiations process. (*Id.* at p. 11.)

On February 28, 2012, Local 21 requested to meet over what it considered to be a change in position. The City did not respond until March 5, 2012, the day before the City Council vote. At that point, the City declined further meetings, asserting both that Local 21 had already seen the latest draft charter amendment and that the City needed to act on March 6, 2012. The City's failure to articulate its proposal more clearly beforehand, coupled with its later refusal to meet with Local 21 to clarify its stance indicates a lack of good faith. The City did not even respond to Local 21 until the day before the City Council voted on Resolution No. 76158. It refused Local 21's request to delay the City Council vote, leaving no time for further discussion. In light of the record as a whole, the City's conduct further suggests that the parties did not reach genuine impasse before the City approved Resolution No. 76158.

E. The City's Approval of Resolution No. 76158

As explained above, bona fide impasse can only exist when the employer's conduct is free from unfair labor practices. (*City of San Jose, supra*, PERB Decision No. 2341-M, pp. 39-40.) The record in this case shows that the parties began the second round of mediation after the City unilaterally approved a retirement reform ballot measure. In *San Mateo County Community College District* (1979) PERB Decision No. 94 (*San Mateo County CCD*), the Board detailed the corrosive effects one party's unilateral action has on bargaining. That case concerned an employer's unilateral imposition of a 6.25 percent salary reduction following "informal talks" with the union, but no actual bargaining. (*Id.* at pp. 7-8.) The Board described the employer's conduct as having a "destabilizing and disorienting impact on

employer-employee relations." (*Id.* at pp. 14-15, citing *Fibreboard Paper Products Corp. v. NLRB* (1964) 379 U.S. 203, p. 211.) This is because:

> An employer's single-handed assumption of power over employment relations can spark strikes or other disruptions at the work place. Similarly, negotiating prospects may also be damaged as employers seek to negotiate from a position of advantage, forcing employees to talk the employer back to terms previously agreed to. This one-sided edge to the employer surely delays, and may even totally frustrate, the process of arriving at a contract.

(*Id.* at p. 15; see also *Moreno Valley Unified School District v. PERB* (1983) 142 Cal.App.3d 191, pp. 199-200; *County of Santa Clara, supra*, PERB Decision No. 2321-M, p. 23.)

In addition, an employer's "unilateral actions derogate the representative's negotiating power and ability to perform as an effective representative in the eyes of employees." (*San Mateo County CCD, supra*, PERB Decision No. 94, p. 15.) Such conduct undermines an exclusive representative's ability to fairly represent all of its bargaining unit. (*Id.*, citing *NLRB v. Katz* (1962) 369 U.S. 736, p. 744; see also *County of Santa Clara, supra*, PERB Decision No. 2321-M, p. 23.)

A third reason for disfavoring unilateral changes is that "[s]uch changes also upset the delicate balance of power between management and employee organizations painstakingly established by our statutes. '[T]he bilateral duty to negotiate is negated by the assertion of power by one party through unilateral action on negotiable matters.'" (*County of Santa Clara, supra*, PERB Decision No. 2321-M, p. 23, quoting *San Mateo County CCD, supra*, PERB Decision No. 94, p. 16.)

Finally, unilateral action "may also unfairly shift community and political pressure to employees and their organizations, and at the same time reduce the employer's accountability

to the public." (*San Mateo County CCD, supra*, PERB Decision No. 94, p. 16; see also *County of Santa Clara, supra*, PERB Decision No. 2321-M, p. 23.)

In another case, the Board held that "where an employer unilaterally changes a working condition which is at the time a subject of negotiations, the required element of good faith on the part of the employer is destroyed." (*Antioch Unified School District* (1985) PERB Decision No. 515, pp. 18-19, citing *Amador Valley Joint Union High School District* (1978) PERB Decision No. 74; see also *Los Angeles Unified School District* (1990) PERB Decision No. 860, proposed decision, p. 26 ["As a practical matter, it is clear that . . . a unilateral action alters the balance of bargaining power held by the parties."].)

The Board's forceful denunciation of unilateral action is not mere hyperbole. As the court found in *Vernon Fire Fighters, Local 2312 IAFF v. City of Vernon* (1980) 107 Cal.App.3d 802, "the employer's fait accompli thereafter makes impossible the give and take that are the essence of labor negotiations." (*Id.* at p. 823.) Thus, later offers to bargain after the change cannot cure the defect. (*Stanislaus CFPD I, supra*, PERB Decision No. 2231-M, p. 13; *State of California (Department of Personnel Administration)* (1993) PERB Decision No. 995-S, proposed decision, p. 22.) The Board explained the reasoning behind this position in *Dry Creek Joint Elementary School District* (1980) PERB Order No. Ad-81a (*Dry Creek JESD*), a case involving the Board's review of an arbitration award. There, the arbitrator found that the employer violated sections of the parties' collective bargaining agreement by changing negotiated salary provisions. (*Id.* at pp. 2-3, 5.) The arbitrator ordered the parties to negotiate over salary issues, but declined to first reverse the imposed changes. (*Id.* at p. 7.) In its review of that award, the Board stated "PERB has made it clear--and now reiterates--that good faith negotiations cannot and should not proceed until the status quo is restored." (*Id.* at

p. 8, citing *San Mateo County CCD*, *supra*, PERB Decision No. 94; *San Francisco Community College District* (1979) PERB Decision No. 105.) Thus, the Board concluded that the "arbitrator's remedy, which only directs that the parties enter into negotiations, would therefore require that the employees and their representative enter negotiations on the basis of first surrendering fundamental statutory rights to bargain in good faith." (*Id.* at p. 9.) The Board found that such an award was repugnant to the very purposes of public sector collective bargaining,[18] reasoning that the award, "if allowed to stand, would throw the parties negotiating relationship into an imbalance that would necessarily frustrate the Act's intent that negotiations proceed in good faith." (*Id.* at p. 9.) Using similar reasoning, the Board later held an employer is "not entitled to implement its 'last, best and final' offer, having already illegally altered the status quo during the negotiations process." (*Temple City USD*, *supra*, PERB Decision No. 841; see also *Noel Corp.* (1994) 315 NLRB 905, p. 911 ["Although an employer who has bargained in good faith to impasse normally may implement the terms of its final offer, it is not privileged to do so if the impasse is reached in the context of serious unremedied unfair labor practices that affect the negotiations."], enf. den. on other grounds at *Noel Foods v. NLRB* (D.C. Cir. 1996) 82 F.3d 1113, p. 1121.)

In the present case, it is undisputed that Resolution No. 76087 remained in place throughout the parties' 2012 meetings. It was only rescinded when the City Council

[18] *Dry Creek JESD*, *supra*, PERB Order No. Ad-81a was decided under EERA. As explained above, both EERA and the MMBA share the central purpose "to promote the improvement of personnel management and employer-employee relations" in the public sector. (See MMBA, § 3500(a); Gov. Code, § 3540.) Moreover, both EERA and the MMBA are part of the Legislature's effort to create uniform, statewide practices for resolving labor disputes. (See *City of Seal Beach*, *supra*, 36 Cal.3d at p. 600; *International Federation of Professional &Technical Engineers v. Bunch* (1995) 40 Cal.App.4th 670, p. 676.)

concurrently approved Resolution No. 76158. It is further undisputed that Resolution No. 76087 changed the status quo for the parties. The City states in closing brief that:

> the December 2011 ballot measure was not a "condition", but merely described the status quo that the measure adopted in December 2011 would go on the ballot unless something else were to occur to prevent this default action.

(City's Closing Brief, § B(4), p. 25, lines 18-20.) As the Board found in *County of Santa Clara*, *supra*, PERB Decision No. 2321-M and *San Mateo County CCD*, *supra*, PERB Decision No. 94, the City's unilateral change to the status quo upset the delicate balance established through the MMBA's the meet and confer requirements. The City's failure to repeal Resolution No. 76087 prior to commencing subsequent bargaining ensured that the balance remained in the City's favor throughout the 2012 mediation sessions. This environment was not conducive to good faith bargaining, because "good faith negotiations cannot and should not proceed until the status quo is restored." (*Dry Creek JESD*, *supra*, PERB Order No. Ad-81a, p. 8.) The record in this case shows that the City leveraged its advantage in its one and only offer in the subsequent meetings. It proposed either the terms from its February 8, 2012 draft or to retain the relatively less favorable terms from Resolution No. 76087.

The damage in this case was not reduced by the fact that the City merely imposed proposed ballot measure language, instead of actual changes to unit members' retirement benefits. Unilateral changes are disfavored not only because of actual changes to employees' working conditions, but also because of the harm to the bargaining process itself. (See *San Mateo County CCD*, *supra*, PERB Decision No. 94, pp. 14-16.) This harm exists even in cases where the implemented policy has not even taken effect. (*County of Sacramento*, *supra*, PERB

Decision No. 1943-M, p. 12; *Anaheim UHSD*, *supra*, PERB Decision No. 201, p. 11.) The negotiations in this case were over the City's proposed ballot measure. The City improperly assumed control over those negotiations by unilaterally approving the draft measure in Resolution No. 76087. Requiring Local 21 to participate in later negotiations from this fundamentally disadvantaged position is anathema to good faith negotiations.

The City correctly points out that it made additional concessions after it unilaterally adopted Resolution No. 76087, but as explained above, later bargaining does not unravel the harm from one party's unilateral action. (*Stanislaus CFPD I*, *supra*, PERB Decision No. 2231-M, p. 13. Likewise, in *Modesto City Schools*, *supra*, PERB Decision No. 291, the Board concluded that an employer's concessions offered as part of a fait accompli were not sufficient to overcome its earlier unlawful bargaining conduct. (*Id.* at pp. 42-43.) Here, the City made its February 8, 2012 offer already knowing that it achieved the changes it sought. At this point, it cannot be determined what progress might have been made in negotiations had the parties' 2012 negotiations started from status quo. (See *Temple City USD*, *supra*, PERB Decision No. 841, proposed decision, pp. 31-32 [holding that after an employer's unilateral change "the mutual dispute resolution process by definition ends because the employer loses incentive to participate in the process since it has already imposed terms it deemed satisfactory"].)

Accordingly, I conclude that any subsequent meetings after the City approved Resolution No. 76087 could not have occurred in good faith. The parties were therefore not at bona fide impasse at the time the City unilaterally approved Resolution No. 76158. This conduct therefore violates the duty to negotiate in good faith unless the City's bargaining

obligations were excused. (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, p. 38; *County of Sacramento* (2009) PERB Decision No. 2045-M, p. 4)

I recognize that the conclusions reached here are based, in large part, on events occurring outside the statute of limitations period. One might argue that the court in *Bryan Manufacturing*, *supra*, 362 U.S. 411 would disfavor such a conclusion. In that case, the employer challenged the validity of a union security clause by claiming that the union lacked majority status at the time the clause was adopted. (*Id.* at pp. 413-414.) The employer raised the claim around a year after the parties adopted the security clause. (*Ibid.*) The court rejected the employer's argument, reasoning that the security clause was "perfectly lawful on the face of things" and only made allegedly unlawful by conduct outside the six month statute of limitations. (*Id.* at pp. 419.)

In contrast, the issue in this case is whether the parties were at bona fide impasse at the time the City approved Resolution No. 76158. Impasse determinations are primarily questions of fact made after reviewing the parties' *entire* bargaining history. According to PERB Regulation 32793(c):

> In determining whether an impasse exists, the Board shall investigate and may consider the number and length of negotiating sessions between the parties, the time period over which the negotiations have occurred, the extent to which the parties have made and discussed counter-proposals to each other, the extent to which the parties have reached tentative agreement on issues during the negotiations, the extent to which unresolved issues remain, and other relevant data.

(See also *County of Riverside*, *supra*, PERB Decision No. 2360-M, p. 14.) Parties only reach genuine impasse when, despite the parties' good faith, they reach a point where negotiations would be either "fruitless" or "futile" because the parties have each considered the other's

proposals and counterproposals in a good faith attempt to reach agreement, but nevertheless remain "deadlocked" in their respective positions. (*County of Riverside*, citations omitted; see also City EERR section 2(l).) Thus, analyzing the full scope of the parties' bargaining conduct is integral to determining whether they were at genuine impasse at the time the employer took unilateral action. Artificially ignoring the parties' earlier negotiations, solely because of timing is not consistent with PERB's analysis of bargaining conduct. (See *Rio SD*, *supra*, PERB Decision No. 1986, p. 10, fn. 7.)

In addition, unlike in *Bryan Manufacturing*, *supra*, 362 U.S. 411, it is not the case here where "the statute of limitations would never run in a case of this nature." (*Id.* at p. 416.) Local 21 was not in a position to understand how the City's earlier unilateral change would impact the parties' subsequent bargaining over Resolution No. 76158 until those negotiations occurred. Similarly, Local 21 could not have challenged the City's approval of Resolution 76158 until the City either took official action or otherwise made a firm decision to implement that resolution. (*Omnitrans*, *supra*, PERB Decision No. 2001-M, at p. 6.) In addition, unlike in *Bryan Manufacturing*, Local 21's claim regarding Resolution No. 76158 has a fixed statute of limitations period that began on March 7, and ended on September 6, 2012. Local 21 filed its charge within that period.

Finally, it is not the case here where "the entire foundation of the unfair labor practice" was based on time-barred claims. (*Bryan Manufacturing*, *supra*, 362 U.S. at p. 417.) As explained above, the City's bargaining conduct extended into the statute of limitations period in this case. On February 28, 2012, Local 21 requested to meet and confer over the City's conflicting versions of its final offer. The City declined to respond to that request until March 5, 2012, which is within the statute of limitations period.

For all these reasons, I conclude that the parties were not at genuine impasse when the City approved Resolution No. 76158. This conduct violates the duty to negotiate in good faith unless the City's bargaining obligations were excused. (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, p. 38; *County of Sacramento*, *supra*, PERB Decision No. 2045-M, p. 4)

IV. The City's Defense

The City defends its unilateral action by arguing that it was excused from any bargaining obligations due to what it described as the "practical and legal requirement of a statutory deadline for submission of a ballot initiative." The City cites in support *Compton Community College District* (1989) PERB Decision No. 720 (*Compton CCD*), which outlined that an employer, "prior to agreement or exhaustion of impasse procedures, may implement a *nonnegotiable* decision after providing reasonable notice and a meaningful opportunity to bargain over the [negotiable] *effects* of that decision." (*Id.* at p. 14 (emphasis supplied).) That test was approved of and restated by the Board recently in *Trustees of the California State University* (2012) PERB Decision No. 2287-H. In that later case, the Board reiterated that the test allows for implementation of a "non-negotiable decision" prior to completing effects bargaining, when:

> (1) [the] implementation date [is] based on immutable deadline or important managerial interest, (2) notice of [the] decision and implementation date [is] given sufficiently in advance of implementation date to allow for meaningful negotiations prior to implementation, and (3) the employer negotiates in good faith prior to implementation and continues to negotiate afterwards on unresolved issues.

(*Id.* at p. 12, citing *Compton CCD*.)

The test from *Compton CCD*, *supra*, PERB Decision No. 720 does not apply here because it only appertains to an employer's implementation of *nonnegotiable* decisions. (*Id.* at

p. 14; see also *Trustees of the California State University*, *supra*, PERB Decision No. 2287-H p. 12.) This test originates from Board Member Craib's dissenting opinion in *Lake Elsinore School District* (1988) PERB Decision No. 696 (*Lake Elsinore SD*). (*Compton CCD*, p. 15.)[19] The purpose of the test, according to Craib, is to prevent "[t]he indefinite postponement of implementation [of a nonnegotiable decision, which] would effectively undermine the employer's right to make the decision and would blur the distinction between decision and effects bargaining." (*Lake Elsinore SD*, Craib dissent, p. 24.) That reasoning is not relevant in the present case because it is undisputed that the parties' negotiations concerned *negotiable* matters such as post-employment benefits for current and future employees. The City's authority to make *nonnegotiable* decisions is not at issue.

Moreover, even if the test from *Compton CCD*, *supra*, PERB Decision No. 720 applied, the City would not have satisfied the elements of that test. The City contends that the statutory timelines required for placing a charter amendment on its local ballot created an "immutable deadline" under the first element of the test. A similar argument was considered and rejected in *County of Santa Clara*, *supra*, PERB Decision No. 2120-M. There, a county employer argued that statutory timelines for ballot measures created an imminent need to approve a prevailing wage measure without completing negotiations. It argued that further bargaining would have prevented the county from including that issue in its preferred election date. (*Id.* at pp. 16-17.) The Board rejected that argument because there was no evidence about the need to proceed on the chosen election date. The mere fact that the employer favored a particular

[19] Board Member Craib was the lead author in *Compton CCD*, *supra*, PERB Decision No. 720.

election date was not sufficient to excuse the county's bargaining obligations. (*Id.* at p. 17; see also *County of Santa Clara*, *supra*, PERB Decision No. 2114-M, pp. 15-16.)

In the present case, it is undisputed that the City Council needed to approve of any charter amendments by March 9, 2012, in order to qualify for the June 5, 2012 election. But the City never explained the need for proceeding with the election in June 2012, as opposed to some later date after fulfilling any bargaining obligations. Without this evidence, I cannot conclude that the City had an immutable deadline or other important interest to act unilaterally. In addition, the test in *Compton CCD*, *supra*, PERB Decision No. 720 serves to excuse an employer from completing bargaining; it does not excuse bad faith conduct earlier in the negotiations process. For the reasons discussed in greater detail above, the City has also not established that it bargained with Local 21 in good faith prior to approving either Resolution No. 76087 or Resolution No. 76158. Thus, the City has failed to satisfy the third element of the test from *Compton CCD*.

The City also argued in its answer to the PERB complaint that its bargaining obligation was excused under PERB's business necessity doctrine. It raised no arguments supporting that defense in its closing briefs and for that reason it is considered to be abandoned. Even if that was not the case, the City did not demonstrate that it faced an "an actual financial emergency which leaves no real alternative to the action taken and allows no time for meaningful negotiations before taking action." (*Calexico Unified School District* (1983) PERB Decision No. 357, proposed decision, p. 20, citing *San Francisco Community College District*, *supra*, PERB Decision No. 105; see also *City of Davis* (2012) PERB Decision No. 2271-M, proposed decision, pp. 24-25.) Although the City clearly expressed a general interest in stemming the growth of its pension costs as soon as possible, there was no evidence that this concern rose to

emergency proportions when it approved Resolution No. 76087 on December 6, 2011, or when it approved Resolution No. 76158 on March 6, 2012. It also did not prove the existence of any emergency by the June 5, 2012 election date. In fact, the evidence suggests to the contrary. In early December 2011, the Pension Plans' actuary projected lower pension costs and the very people within the City that supported the charter amendments also recommended delaying the election and delaying any declaration of a fiscal and/or service level emergency. No emergency was ever declared at the times relevant to this case. No evidence was presented about the need to place the retirement reform issues on the City's June 2012 ballot. Under the facts presented in this case, the City's generalized concern about pension costs was not sufficient to qualify as an emergency that excused its bargaining obligations. (*City of Long Beach* (2012) PERB Decision No. 2296-M, p. 26-28.)

After reviewing the record as a whole, I conclude that the City did not satisfy its obligations meet and confer in good faith with Local 21 prior to approving Resolution No. 76158. The City has not established that any valid defense excusing its duty to bargain. Therefore, the City's conduct violates the duty to meet and confer in good faith under MMBA sections 3503, 3505, 3506, and 3506.5(a), (b), and (c); as well as PERB Regulations 32603(a), (b), and (c). (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, p. 38; *County of Sacramento*, *supra*, PERB Decision No. 2045-M, p. 4.)

REMEDY

MMBA section 3509(b) authorizes PERB to order "the appropriate remedy necessary to effectuate the purposes of this chapter." (*Omnitrans* (2010) PERB Decision No. 2143-M, p 8.) This includes an order to cease and desist from conduct that violates the MMBA. (*Id.* at p. 9.) PERB's remedial authority includes the power to order an offending party to take affirmative

actions to effectuate the purposes of the MMBA. (*City of Redding* (2011) PERB Decision No. 2190-M, pp. 18-19.)

PERB also has the authority to order the City to restore the status quo ante and rescind any unilaterally adopted policy changes. In *California State Employees' Association v. PERB* (1996) 51 Cal.App.4th 923, p. 946, the court found:

> Restoration of the status quo is the normal remedy for a unilateral change in working conditions or terms of employment without permitting bargaining members' exclusive representative an opportunity to meet and confer over the decision and its effects. This is usually accomplished by requiring the employer to rescind the unilateral change and to make the employees "whole" from losses suffered as a result of the unlawful change.

(Citations omitted; see also *County of Sacramento*, *supra*, PERB Decision No. 2045-M, pp. 3-4, citing *County of Sacramento*, *supra*, PERB Decision No. 1943-M.) Based on this authority, rescission of the unilaterally adopted resolution is appropriate in this case with one important distinction. In *City of Palo Alto* (2014) PERB Decision No. 2388-M, the Board recently addressed its remedial authority in cases involving a city's violation of the MMBA in the context of a charter amendment election.[20] The Board found:

> We do not believe our remedial authority extends to ordering the results of an effective municipal election to be overturned. Such remedy lies with the courts. (*Pala Band of Mission Indians v. Board of Supervisors* (1997) 54 Cal.App.4th 565, 574, 583; *IAFF v. City of Oakland* (1985) 174 Cal.App.3d 687, 698 [quo warranto writ is the exclusive remedy to attack procedural regularity by which charter amendments are put before electorate]; *City of Coronado v. Sexton* (1964) 227 Cal.App.2d 444, 453.) Based on the remedial authority which we do exercise

[20] At that time this proposed decision issues, the Board's decision in *City of Palo Alto*, *supra*, PERB Decision No. 2388-M was subject to judicial review pursuant to MMBA section 3509.5. Nevertheless, the decision is the best example of PERB's position on the issue of remedies in cases involving the charter amendment process.

> under the MMBA, to wit, finding the City violated the MMBA and directing the City itself to rescind its July 18, 2011 resolution referring to voters the ballot measure, other persons, including the charging party here, may choose to seek such quo warranto relief.

(*Id.* at pp. 49-50.) In other words, the Board has the authority to order a city to rescind its approval of a ballot resolution, but lacks the authority to rescind the results of the election that followed the resolution. Applying that reasoning to this case, the City is directed to rescind its March 6, 2012 approval of Resolution No. 76158. Local 21, or other affected entities or individuals, may thereafter pursue judicial remedies, as appropriate.

Additional appropriate remedies in this case include an order to cease and desist from conduct that violates the MMBA as well as an order to post a notice of this order, signed by an authorized representative of the City. These remedies effectuate the purposes of the MMBA because employees are informed that the City has acted in an unlawful manner, is required to cease and desist from such conduct, and will comply with the order. (*City of Selma* (2014) PERB Decision No. 2380-M, proposed decision, pp. 14-15.) The notice posting shall include both a physical posting of paper notices at all places where members of Local 21's bargaining unit are customarily placed, as well as a posting by "electronic message, intranet, internet site, and other electronic means customarily used by the [City] to communicate with its employees in the bargaining unit." (*Centinela Valley Union High School District* (2014) PERB Decision No. 2378, pp. 11-12, citing *City of Sacramento, supra*, PERB Decision No. 2351-M.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the City of San José (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505, 3506, and 3506.5(a), (b), and (c) and

California Code of Regulations, title 8, sections 32603(a), (b), and (c). The City violated the MMBA by approving Resolution No. 76158 without satisfying its duty to meet and confer in good faith with International Federation of Professional and Technical Engineers, Local 21, AFL-CIO, (Local 21). All other claims by Local 21 are dismissed.

Pursuant to section 3509(b) of the Government Code, it hereby is ORDERED that the City, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to meet and confer in good faith with Local 21 prior to adopting ballot measures involving changes to retirement benefits for current or prospective employees.

2. Interfering with Local 21's right to represent the members of its bargaining unit in employment relations with the City.

3. Interfering with the right of bargaining unit members to be represented by the employee organization of their own choosing.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Rescind the City's March 6, 2012 approval of Resolution No. 76158, concerning changes to retirement benefits for the Police and Fire bargaining unit.

2. Within 10 workdays of the service of a final decision in this matter, post copies of the Notice, attached hereto as an appendix, at all work locations where notices to employees in Local 21's bargaining unit customarily are posted. The Notice must be signed by an authorized agent of the City, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps

shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material. The Notice shall also posted by electronic message, intranet, internet site, and other electronic means customarily used by the City to communicate with employees in Local 21's bargaining unit.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Local 21.

Right to Appeal

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, §

11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CE-996-M, *International Federation of Professional and Technical Engineers, Local 21 v. City of San José*, in which all parties had the right to participate, it has been found that the City of San José (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. by approving Resolution No. 76158 without satisfying its duty to meet and confer in good faith with International Federation of Professional and Technical Engineers, Local 21, AFL-CIO, (Local 21). All other claims by Local 21 are dismissed.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Refusing to meet and confer in good faith with Local 21 prior to adopting ballot measures involving changes to retirement benefits for current or prospective employees.

2. Interfering with Local 21's right to represent the members of its bargaining unit in employment relations with the City.

3. Interfering with the right of bargaining unit members to be represented by the employee organization of their own choosing.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

Rescind the City's March 6, 2012 approval of Resolution No. 76158, concerning changes to retirement benefits for the Police and Fire bargaining unit.

Dated: _____ CITY OF SAN JOSÉ

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 30 CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.